

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,
Plaintiff,

v.

INHANCE TECHNOLOGIES LLC,
Defendant.

Civ. No. 5:22-CV-05055-JFM

EXHIBIT 1
TO PLAINTIFF'S NOTICE OF ADDITIONAL AUTHORITY

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CIVIL CASE NUMBER
PLAINTIFF :
VERSUS : 22-CV-5055
INHANCE TECHNOLOGIES, INC., :
DEFENDANTS :

AUGUST 23, 2023
COURTROOM 3B
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE JOHN F. MURPHY, J.

ORAL ARGUMENT

APPEARANCES:

RICHARD GLADSTEIN, ESQUIRE
JONAH SELIGMAN, ESQUIRE
UNITED STATES ATTORNEYS OFFICE
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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 CONTINUED APPEARANCES:

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14 COUNSEL FOR INTERVENOR PLAINTIFFS

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1 (CLERK OPENS COURT.)

2 THE COURT: PLEASE SIT, EVERYONE.

3 GOOD MORNING. WE ARE HERE TODAY FOR
4 UNITED STATES OF AMERICA VERSUS INHANCE TECHNOLOGIES,
5 LLC. IT'S NUMBER 22-CV-5055.

6 AND COULD I HAVE EVERYONE INTRODUCE
7 THEMSELVES, PLEASE, STARTING WITH PLAINTIFF, THE
8 GOVERNMENT.

9 MR. GLADSTEIN: RICHARD GLADSTEIN, YOUR
10 HONOR. PLEASURE TO BE HERE WITH THE UNITED STATES
11 DEPARTMENT OF JUSTICE REPRESENTING THE EPA.

12 MR. SELIGMAN: GOOD MORNING, YOUR HONOR.
13 JONAH SELIGMAN FOR THE UNITED STATES.

14 MS. SIMMONS: LINDSAY SIMMONS, ATTORNEY
15 WITH EPA.

16 MR. DERGARABEDIAN: ALEX DERGARABEDIAN,
17 ATTORNEY WITH THE EPA.

18 THE COURT: I DIDN'T CATCH THE NAME,
19 SORRY.

20 MR. DERGARABEDIAN: ALEX DERGARABEDIAN.

21 THE COURT: GOOD MORNING.

22 MS. STETSON: GOOD MORNING, YOUR HONOR.
23 KATE STETSON, REPRESENTING THE DEFENDANT, INHANCE.

24 MS. COOK: GOOD MORNING, YOUR HONOR.
25 SUSAN COOK, ALSO REPRESENTING INHANCE.

1 MS. GIBSON: GOOD MORNING, YOUR HONOR.
2 VIRGINIA GIBSON, ALSO REPRESENTING DEFENDANT INHANCE.

3 MR. KUSHNER: GOOD MORNING, YOUR HONOR.
4 ADAM KUSHNER, REPRESENTING INHANCE.

5 MR. FIORENTINO: GOOD MORNING, YOUR
6 HONOR. MICHAEL D. FIORENTINO, LOCAL COUNSEL FOR THE
7 PLAINTIFF INTERVENORS, THE CENTER FOR ENVIRONMENTAL
8 HEALTH, JAY DE LA ROSA AND THE PUBLIC EMPLOYEES FOR
9 ENVIRONMENTAL RESPONSIBILITY.

10 MR. SUSSMAN: YOUR HONOR, GOOD MORNING, I
11 AM BOB SUSSMAN. I AM FROM SUSSMAN AND ASSOCIATES IN
12 WASHINGTON, D.C. AND LEAD COUNSEL FOR THE PLAINTIFF
13 INTERVENORS, CEH AND PEER.

14 I JUST WANTED TO COMMENT THAT I AM USING
15 AN ASSISTED HEARING DEVICE TODAY, AND IT WOULD HELP ME
16 ENORMOUSLY IF PEOPLE SPEAK INTO THE MIC, BECAUSE THEN
17 THAT WILL CONNECT WITH MY HEARING AIDS. SO I WOULD BE
18 GRATEFUL IF WE COULD KEEP THAT IN MIND. THANK YOU.

19 MS. DINERSTEIN: GOOD MORNING, YOUR
20 HONOR. I AM PAULA DINERSTEIN. I AM AN ATTORNEY WITH
21 THE PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITIES,
22 OR PEER FOR SHORT, ONE OF THE PLAINTIFF INTERVENORS.

23 MS. MERCOLA: GOOD MORNING, MONICA
24 MERCOLA, STAFF COUNSEL FOR THE PUBLIC EMPLOYEES FOR
25 ENVIRONMENTAL RESPONSIBILITY.

1 THE COURT: ALL RIGHT.

2 MS. TEUBNER: GOOD MORNING, COLLEEN
3 TEUBNER, STAFF ATTORNEY WITH PUBLIC EMPLOYEES FOR
4 ENVIRONMENTAL RESPONSIBILITY.

5 THE COURT: OKAY. ANYBODY ELSE?

6 ALL RIGHT. WELL, GOOD MORNING AND
7 WELCOME. SO I HAVE SOME EXPECTATIONS. MR. GLADSTEIN,
8 YOU ARE GOING TO BE SPEAKING FOR THE UNITED STATES
9 GENERALLY?

10 MR. GLADSTEIN: YOUR HONOR, WE ARE GOING
11 TO BE DIVIDING UP OUR ARGUMENT. I WILL BE ARGUING FIRST
12 ON THE ISSUES OF RIPENESS, AND THEN WE WILL ADDRESS THE
13 INJUNCTIVE RELIEF, IF YOU WANT TO ASK US ABOUT THAT AT
14 THE END. BUT MR. SELIGMAN WILL BE HANDLING MOST OF THE
15 ARGUMENT BEYOND THE RIPENESS ISSUE.

16 THE COURT: ALL RIGHT.

17 AND, MS. STETSON, ON YOUR SIDE?

18 MS. STETSON: I WILL BE HANDLING THE
19 ARGUMENT, YOUR HONOR.

20 THE COURT: ALL RIGHT.

21 AND FROM THE INTERVENORS?

22 MR. SUSSMAN: YOUR HONOR, I WILL BE DOING
23 THE BULK OF THE ARGUMENT. MY COLLEAGUE, PAULA
24 DINERSTEIN FROM PEER, WILL SPEAK TO SIMILAR ASPECTS OF
25 THE MOTION FOR AN INJUNCTION.

1 THE COURT: OKAY. THAT'S VERY HELPFUL.

2 AS TO MICROPHONES AND THE FORMAT OF THE
3 ARGUMENT, WE HAVE A PODIUM WITH A MICROPHONE, AND IF YOU
4 WERE TO STAND AT THE PODIUM, YOU WOULD HAVE GOOD
5 RECEPTION. WHEN YOU STAND AT THE TABLE, I NOTICED IN
6 THIS COURTROOM, IF YOU STAND AT THE TABLE, ACTUALLY THE
7 MICROPHONE RECEPTION IS NOT THAT GREAT.

8 SO I SUPPOSE I WOULD ASK THAT YOU EITHER
9 COME TO THE PODIUM TO SPEAK, OR IF YOU WOULD LIKE TO SIT
10 AND SPEAK, THAT'S FINE. WE ARE ALL LAWYERS AND FRIENDS
11 HERE, SO I DON'T HAVE A PROBLEM WITH THAT IF THAT'S
12 COMFORTABLE FOR YOU. YOU CAN ALL MAKE YOUR OWN DECISION
13 ON THAT FRONT. BUT STANDING AND SPEAKING AT THE TABLE
14 IS PROBABLY THE WORST-CASE SCENARIO FOR THE MICROPHONES.

15 OKAY. LET'S START THEN ON THE RIPENESS
16 ISSUE, MR. GLADSTEIN, LET'S START THERE.

17 AND THE QUESTION I WANT TO START THIS
18 WITH IS --

19 MR. GLADSTEIN: MAY I APPROACH?

20 THE COURT: YOU MAY, OF COURSE.

21 THE QUESTION I WANT TO START WITH IS WHY
22 ARE WE HERE? WHY IS THIS LAWSUIT HAPPENING? AND WHY IS
23 THE GOVERNMENT TAKING AN ENFORCEMENT APPROACH HERE IN
24 PARALLEL TO THE REGULATORY APPROACH?

25 MR. GLADSTEIN: YOUR HONOR, THANK YOU.

1 THE STATUTE IS VERY CLEAR, YOUR HONOR,
2 THAT NO MANUFACTURING MAY OCCUR UNTIL THE EPA HAS
3 RENDERED A DECISION ON THE DEFENDANT'S APPLICATION. THE
4 DEFENDANT HAS APPLIED, AND THE NICKNAME FOR THAT IS
5 SNUN, BUT PENDING THAT DECISION, SECTION -- I'M SORRY,
6 15 U.S.C. 2604(A), YOU KNOW, CLEARLY STATES THAT NO
7 MANUFACTURING MAY OCCUR. AND THAT'S WHY -- IT'S
8 UNDISPUTED, YOUR HONOR, THAT THE DEFENDANT IS
9 MANUFACTURING.

10 THE COURT: HOW MANY ENFORCEMENT ACTIONS
11 LIKE THIS HAVE THERE EVER BEEN WHILE A SNUN IS PENDING?

12 MR. GLADSTEIN: THAT'S REALLY THE KEY TO
13 THIS CASE, YOUR HONOR, IS THERE WAS A VERY SIGNIFICANT
14 CHANGE IN THE STATUTE MADE IN 2016. TSCA WAS ENACTED IN
15 1976, AND PART OF THE PROBLEM, YOUR HONOR, WAS THAT THE
16 APPLICATIONS FOR NEW CHEMICALS AND TO A LESSER EXTENT
17 CHEMICALS FOR SIGNIFICANT NEW USES KEPT ON PILING UP
18 WITH THE AGENCY, BECAUSE THE AGENCY HAS, OF COURSE AS
19 ALL AGENCIES DO, LIMITED RESOURCES. SO THE PUBLIC WAS
20 NOT BEING PROTECTED ACCORDING TO CONGRESS.

21 AND SO IN 2016, CONGRESS SHIFTED THE
22 BURDEN IN WHAT IS KNOWN AS THE LAUTENBERG AMENDMENTS,
23 AND WE HAVE PRESENTED THAT IN OUR PAPERS, THAT THERE IS
24 A VERY MAJOR CHANGE IN THE STATUTE. THE BURDEN SHIFTED
25 FROM THE -- BEING ON THE EPA TO MAKE A DETERMINATION

1 THAT THE USE COULD NOT OCCUR AND THAT THE MANUFACTURING
2 COULD NOT OCCUR TO -- TO THE INDUSTRY TO DEMONSTRATE TO
3 EPA THAT THERE WAS NOT AN UNREASONABLE RISK TO THE
4 PUBLIC.

5 I FORGET, DID I ANSWER YOUR QUESTION?

6 THE COURT: NO, NOT YET.

7 MR. GLADSTEIN: ASK IT AGAIN, I
8 APOLOGIZE.

9 THE COURT: HOW MANY ENFORCEMENT ACTIONS
10 HAVE THERE BEEN?

11 MR. GLADSTEIN: RIGHT. SO THIS IS THE
12 FIRST LITIGATED ENFORCEMENT ACTION UNDER THE 2016
13 AMENDMENTS. SO NORMALLY WHAT WILL HAPPEN IS IF THERE IS
14 A PROBLEM, THE COMPANY COMES IN AND A CONSENT ORDER IS
15 ISSUED.

16 HERE, INHANCE IS CONTESTING, AND OF
17 COURSE THEY HAVE A RIGHT TO DO THAT, THAT THEY ARE
18 COVERED BY THE SIGNIFICANT -- YOU KNOW, BY THE
19 LONG-CHAIN PFAS RULE. THEY CONTEST, THEY SAY, YOU
20 KNOW -- THEY DIDN'T APPLY, THEY DIDN'T APPLY UNTIL EPA
21 SAID THEY HAD TO APPLY, SO THEY ARE CONTESTING.

22 AND YOU WILL HEAR FROM MS. STETSON THAT
23 THEY DON'T THINK IT APPLIES TO THEM. SO IN MOST
24 SITUATIONS, IN ALMOST ALL SITUATIONS, THESE ISSUES ARE
25 WORKED OUT CONSENSUALLY WITH THE EPA.

1 HERE, UNFORTUNATELY, THERE IS A DISPUTE.
2 AND SO IN ORDER TO IMPLEMENT THE INTENT OF THE 2016
3 AMENDMENTS, EPA IS TAKING THE POSITION, AND I JUST THINK
4 IT IS CONSISTENT WITH THE STATUTE AND CONSISTENT WITH
5 THE CONGRESSIONAL INTENT THAT THERE SHOULD NOT BE
6 MANUFACTURING UNTIL EPA HAS THE OPPORTUNITY TO REVIEW
7 THE SNUN, TO LOOK AT THE RISK ASSESSMENT THAT IS
8 PRESENTED BY THE COMPANY AND MAKE ITS OWN DETERMINATION.

9 AND SO I AM SORRY I TOOK SO LONG TO
10 ANSWER YOUR QUESTION, BUT THE -- AS FAR AS I KNOW, THIS
11 IS THE FIRST LITIGATED ACTION TO BASICALLY FULFILL THE
12 INTENT OF THOSE 2016 AMENDMENTS.

13 THE COURT: BUT ISN'T PART OF THE REASON
14 THIS IS HAPPENING IS THAT UNIQUE SITUATION WHERE AS OF
15 2015, IN FACT, AS OF 2020, NEITHER THE EPA NOR INHANCE
16 KNEW THAT THEY COULD POTENTIALLY BE COVERED BY THE RULE?

17 MR. GLADSTEIN: YES, AND THAT'S CORRECT,
18 YOUR HONOR. I DON'T WANT TO STEAL MR. SELIGMAN'S
19 THUNDER ON THAT, BUT YES, THE -- WHEN YOU LOOK AT THE
20 STATUTE, THERE ARE THREE PRONGS TO THE STATUTE WHERE THE
21 BURDEN -- AGAIN, CONSISTENT WITH THE 2016 AMENDMENTS --
22 THE BURDEN SHIFTED FROM EPA TO THE INDUSTRY. THE
23 POLICY -- YOU KNOW, THE SECTION ONE, IT'S THE
24 RESPONSIBILITY OF THE INDUSTRY TO NOTIFY EPA
25 REGARDING --

1 THE COURT: SO WHAT IS SUPPOSED TO HAPPEN
2 IS A PROPOSED RULE GETS PUBLISHED AND THEN EVERYONE WITH
3 A STAKE IN THE RULE COMES AND GETS A SEAT AT THE TABLE
4 AND DISCUSSES POTENTIAL ONGOING USES, RIGHT?

5 MR. GLADSTEIN: RIGHT.

6 THE COURT: AND THEN GOOD REGULATION CAN
7 HAPPEN, AND A FINAL RULE EVENTUALLY WILL ISSUE THAT
8 TAKES ACCOUNT OF THOSE ONGOING USES, RIGHT?

9 MR. GLADSTEIN: RIGHT.

10 THE COURT: BUT THAT DIDN'T HAPPEN HERE,
11 BECAUSE NOBODY KNEW THAT INHANCE'S SURFACE FLUORINATION
12 TECHNOLOGY WAS AT ISSUE, RIGHT?

13 MR. GLADSTEIN: THAT'S RIGHT.

14 THE COURT: SO WHY NOT JUST ISSUE AN
15 AMENDED RULE OR A NEW RULE OR AN UPDATED RULE AND TAKE
16 CARE OF THIS ADMINISTRATIVELY?

17 MR. GLADSTEIN: WELL, THERE IS SECTION 5
18 AND THERE'S SECTION 6. SECTION 6 DEALS WITH RULES
19 GENERALLY; SECTION 5 APPLIES TO PARTICULAR NEW USES.
20 AND IT GOES BACK TO THE --

21 THE COURT: CAN YOU STAY ON MY QUESTION?

22 MR. GLADSTEIN: I'M SORRY.

23 THE COURT: IT SEEMS TO ME INSTEAD OF
24 THIS ENFORCEMENT ACTION, YOU SIMPLY COULD HAVE UPDATED
25 THE RULE, RIGHT, TO SAY, OKAY, A SIGNIFICANT PART OF

1 THIS -- ONE OF THE SIGNIFICANT NEW USES IS PFAS PRODUCED
2 DURING FLUORINATION OF HDPE OR OTHER PLASTIC SURFACES.

3 MR. GLADSTEIN: AND I BELIEVE THAT THE
4 AGENCY HAS THE OPTION TO DO THAT AS WELL UNDER A
5 SECTION 6.

6 THE COURT: I AM ASKING WHY NOT.

7 MR. GLADSTEIN: THEY CAN DO THAT, YOUR
8 HONOR, BUT THAT WOULD NOT STOP THE CURRENT VIOLATION
9 THAT IS OCCURRING OF THE MANUFACTURING BEFORE THE AGENCY
10 ASSESSES THE RISK.

11 THE COURT: RIGHT, BUT I AM JUST ASKING
12 WHY THE AGENCY DIDN'T TAKE THAT APPROACH?

13 MR. GLADSTEIN: BECAUSE THAT APPROACH IS
14 NOT DEALING WITH THE PRESENT RISK THAT IS OCCURRING.
15 THE RULEMAKING PROCESS --

16 THE COURT: BUT THAT'S HOW THE -- EXCEPT
17 FOR THIS CASE AND EVERY OTHER -- THERE'S LIKE THOUSANDS
18 OF THESE SNU RULES. IN EVERY OTHER CASE, THE PROPOSED
19 RULE IS PUBLISHED, AND THEN THE RELEVANT PARTICIPANTS
20 COME TO THE TABLE AND DISCUSS THE ONGOING USE.

21 SO WHY NOT SIMPLY TAKE THAT APPROACH WITH
22 SURFACE FLUORINATION?

23 MR. GLADSTEIN: WELL, IT'S POSSIBLE TO DO
24 THAT, BUT WHAT EPA WAS DOING WAS TRYING TO IMPLEMENT THE
25 STATUTE THAT SAYS THAT THE ADMINISTRATOR MAKES A

1 DETERMINATION BASED UPON INFORMATION THAT IS REASONABLY
2 AVAILABLE TO THE AGENCY.

3 THE COURT: WHY NOT TAKE THE REGULATORY
4 APPROACH? WHAT IS THE DOWNSIDE?

5 MR. GLADSTEIN: WELL, THE DOWNSIDE IS
6 THAT AS INHANCE HAS ADMITTED AND STATED, THEY ARE
7 MANUFACTURING 200 MILLION CONTAINERS A YEAR THAT ARE
8 POTENTIALLY CAUSING SIGNIFICANT INJURY TO PEOPLE IN THE
9 ENVIRONMENT.

10 THE COURT: I UNDERSTAND.

11 LET ME FLIP THE QUESTION AROUND THE OTHER
12 WAY. WHY NOT USE ENFORCEMENT ACTIONS INSTEAD OF THE
13 TYPICAL REGULATORY PROCESS WHERE YOU IDENTIFY THE SNU
14 AND THEN ALL OF THE POTENTIAL ONGOING USERS COME TO THE
15 TABLE? WHY NOT JUST ENFORCE, GET EVERYBODY OUT OF THE
16 MARKET, YOU KNOW, RIGHT OFF THE WEB, JUST TO PREVENT ANY
17 POTENTIAL RISK, THEN HAVE THE DISCUSSION LATER, WHICH IS
18 WHAT IS HAPPENING HERE?

19 MR. GLADSTEIN: WELL, I THINK THAT WOULD
20 TURN THE PROCESS ON ITS HEAD.

21 THE COURT: ISN'T THAT WHAT'S HAPPENING
22 HERE?

23 MR. GLADSTEIN: I DON'T THINK SO, YOUR
24 HONOR.

25 THE COURT: WHY NOT?

1 MR. GLADSTEIN: BECAUSE THERE IS A
2 PARTICULAR INSTANCE WHERE DUE TO THE GOOD WORK OF THE
3 CITIZENS GROUPS, IT WAS DETERMINED THAT THOUSANDS OF
4 ACRES IN MASSACHUSETTS WERE BEING SPRAYED WITH A
5 PESTICIDE THAT INCLUDED THE PFAS THAT --

6 THE COURT: HAS THAT DATA BEEN VERIFIED
7 BY EPA?

8 MR. GLADSTEIN: YES.

9 THE COURT: WHAT WAS HAT THE NATURE OF
10 THE STUDY RESULTS FROM JUST A COUPLE OF MONTHS AGO WHERE
11 EPA WAS LOOKING AT PFAS LEVELS IN DIFFERENT PESTICIDES
12 USING A COUPLE OF DIFFERENT METHODOLOGIES AND DID NOT
13 FIND PFAS LEVELS IN THE BACKGROUND?

14 MR. GLADSTEIN: I THINK YOU ARE REFERRING
15 TO THE -- IF WE ARE THINKING OF THE SAME STUDY, THERE
16 WAS -- IT WAS NOT CLEAR FROM THE CONTAINERS THAT WERE
17 EXAMINED WHETHER THEY WERE FLUORINATED OR NOT
18 FLUORINATED, YOUR HONOR.

19 THE COURT: WELL, THAT'S INTERESTING.
20 THAT'S SOMETHING WE WILL HAVE TO -- I AM PLANNING ON
21 DISCUSSING WITH THE INTERVENORS THAT EXACT QUESTION.
22 YOU CAN'T KNOW IF YOU ARE DEALING WITH PARTICULAR
23 PESTICIDES, WHETHER THEY CAME OUT OF FLUORINATED OR
24 UNFLUORINATED CONTAINERS.

25 MR. GLADSTEIN: BUT WE KNOW IN THIS

1 INSTANCE, BECAUSE THE COMPANY THAT WAS PROVIDING THE
2 CONTAINERS TO INHANCE THEN SUED INHANCE, CLARK. AND
3 THEN THAT'S HOW EPA LEARNED ABOUT IT. AND THEN EPA
4 ENGAGED WITH INHANCE, AND THEY REFUSED TO STOP. SO EPA
5 ISSUED A NOTICE OF VIOLATION.

6 WE WERE NOT TRYING TO -- EVERY CASE IS
7 DIFFERENT, YOUR HONOR. AND IN THIS CASE, THIS COMPANY
8 IS ENGAGING IN THIS PROCESS, AND THAT'S WHY THIS CASE IS
9 RIPE, IS BECAUSE --

10 THE COURT: HOLD ON BEFORE WE JUMP INTO
11 RIPENESS.

12 I STILL DON'T UNDERSTAND WHAT MADE THE
13 SITUATION WITH INHANCE AND SURFACE FLUORINATION
14 DIFFERENT THAN EVERY OTHER TOXIC SUBSTANCES CONTROL ACT
15 SIGNIFICANT NEW USE REGULATION THAT CAME BEFORE IT. WHY
16 IS THIS THE ONE THAT IS DIFFERENT AND REQUIRES AN
17 ENFORCEMENT ACTION WHILE THIS SNUN IS PENDING INSTEAD OF
18 DEALING WITH IT THROUGH REGULATION? WHY IS THIS THE ONE
19 THAT IS DIFFERENT?

20 MR. GLADSTEIN: SO I RAISED THE ISSUE
21 ABOUT THAT THE STATUTE CHANGED, RIGHT?

22 THE COURT: 2016, IT'S SEVEN YEARS AGO.

23 MR. GLADSTEIN: YES. AND I THINK THE
24 FACT THAT THIS IS THE ONLY LITIGATED CASE THAT WE ARE
25 AWARE OF IS A VERY GOOD INDICATION THAT COMPANIES TRY TO

1 WORK OUT THESE ISSUES WITH THE EPA, AND IN ALMOST ALL
2 INSTANCES CONSENT ORDERS ARE ISSUED.

3 THE COURT: THE REASON THE COMPANIES WORK
4 THIS OUT WITH THE EPA IS YOU ISSUE A PROPOSED NEW RULE
5 THAT ALLOWS FOR A REASONED DISCUSSION AND ADMINISTRATIVE
6 PROCESS TO HAVE.

7 MR. GLADSTEIN: WELL, WHAT I AM TALKING
8 ABOUT IS WHEN THERE IS A NEW USE AND EPA QUESTIONS IT
9 AND THE COMPANY COMES IN AND THEN A CONSENT ORDER IS
10 ISSUED. I'M NOT TALKING ABOUT A BROAD RULE, YOUR HONOR.

11 THE COURT: IS THERE ANY OTHER CASE --
12 HAS THERE EVER BEEN ANOTHER CASE WHERE AN ONGOING USE
13 WAS MISSED BECAUSE NEITHER THE RELEVANT INDUSTRY PLAYERS
14 NOR THE EPA KNEW THAT IT WAS -- WHATEVER IT IS THE USE
15 WAS, WAS IRRELEVANT TO THE SNU?

16 MR. GLADSTEIN: YES. SO I AM NOT AWARE
17 OF A SITUATION LIKE THAT, BUT IT MAY EXIST, YOUR HONOR.

18 THE COURT: SO THERE IS -- THIS IS A
19 FIRST-TIME -- IT'S A FIRST TIME ON BOTH OF THOSE FRONTS.
20 IT'S A FIRST TIME THAT AN ONGOING USE WAS MISSED BECAUSE
21 OF A MUTUAL MISTAKE AND A FIRST TIME THAT AN ENFORCEMENT
22 ACTION LIKE THIS HAS BEEN TRIED WHILE THE SNUN IS
23 PENDING.

24 MR. GLADSTEIN: RIGHT.

25 AND ON THE SECOND ONE, YOUR HONOR, OUR

1 POSITION IS, AND I THINK IT'S CLEAR FROM THE STATUTE,
2 THAT CONGRESS CHANGED THE BURDEN IN 2016, AND THIS IS
3 THE FIRST TIME THAT THERE HAS BEEN A QUESTION ABOUT
4 WHETHER AN INDUSTRY WOULD -- THIS PARTICULAR COMPANY
5 WOULD COMPLY WITH THE REQUIREMENTS OF THOSE AMENDMENTS.

6 THE COURT: LET ME ASK A -- LET ME SHIFT
7 AROUND A LITTLE BIT HERE.

8 THE RELIEF THAT IS SOUGHT IN THIS CASE,
9 THERE'S A DECLARATORY JUDGMENT COUNT AND THERE'S AN
10 INJUNCTION COUNT. AND THE GOVERNMENT IS PRESSING AT
11 THIS STAGE THE DECLARATORY JUDGMENT, IT HAS NOT MOVED
12 FOR AN INJUNCTION.

13 WHY IS THAT? WHAT IS THE LOGIC?

14 MR. GLADSTEIN: SO, YOUR HONOR, WE ARE
15 TRYING TO TAKE A MIDDLE PATH HERE. YOU HAVE TALKED
16 ABOUT A CONCERN, YOU KNOW -- YOU HAVE NOT SAID THOSE
17 WORDS, BUT IS THERE SOME UNFAIRNESS --

18 THE COURT: I ACTUALLY DON'T HAVE MUCH
19 CONCERN ABOUT FAIRNESS, I AM JUST TRYING TO
20 UNDERSTAND -- I MEAN A LOT OF THIS CASE -- THE MOVING
21 PAPERS IN THIS CASE WERE VERY CHALLENGED PRESENTED BY
22 THE FACT THAT ESSENTIALLY NO PRECEDENT BEING OFFERED ON
23 MOST OF THE MAJOR ISSUES THAT ARE BEING PRESENTED HERE,
24 ALL THE WHILE THERE IS A REGULATORY PROCESS GOING ON.

25 I AM NOT PARTICULARLY CONCERNED ABOUT

1 FAIRNESS. IT IS WHAT IT IS, I UNDERSTAND THAT. BUT I
2 AM JUST TRYING TO PUT IT IN CONTEXT AND UNDERSTAND THE
3 MOVING PIECES HERE IN PART BECAUSE I DON'T WANT TO --
4 THERE IS SO MUCH BEING ASKED OF ME HERE AS FAR AS WHAT
5 EVERYONE WANTS ME TO RULE: THE DEFENSES THAT HAVE BEEN
6 RAISED, THE GOVERNMENT'S POSITION, THE INTERVENOR'S
7 POSITION.

8 IT SEEMS TO ME LIKE THE KIND OF CASE
9 WHERE THERE IS AN ENORMOUS RISK IN ME MAKING A RULING
10 THAT HAS GOT POTENTIAL TO DO SOME HARM TO A NUMBER OF
11 PEOPLE IN THIS ROOM, UNWITTINGLY. I KNOW IT'S
12 UNWITTINGLY AND THE TYPE OF ERROR, SO I NEED TO
13 UNDERSTAND THE CONTEXT OF WHAT IS GOING ON AND WHY THIS
14 IS ALL HAPPENING SO I CAN UNDERSTAND WHAT WE ARE DOING.

15 MR. GLADSTEIN: SO THE WAY THIS CAME TO
16 YOU IS THE CITIZENS SENT A 60-DAY LETTER TO EPA UNDER
17 THE STATUTE THAT SAID IF YOU DON'T FILE SUIT, WE ARE
18 GOING TO FILE SUIT. SO THAT FORCED THE EPA TO CONFRONT
19 WHAT WAS THE APPROPRIATE PATH.

20 AND SO, AS I SAID, WE ARE TRYING TO TAKE
21 A MIDDLE ROAD.

22 THE COURT: WHAT WOULD HAVE HAPPENED IF
23 YOU HAD DECIDED NOT TO BRING THIS SUIT?

24 MR. GLADSTEIN: WELL, I MEAN, WHAT DID
25 HAPPEN WAS WE BROUGHT SUIT, AND THEN EIGHT DAYS LATER

1 THE CITIZENS BROUGHT SUIT IN THE DISTRICT OF COLUMBIA.
2 AND WE TOOK THE POSITION THAT THAT WAS INAPPROPRIATE
3 BECAUSE UNLESS -- AND AS DID INHANCE, BECAUSE THE
4 STATUTE SAYS UNLESS THE EPA OR THE UNITED STATES, THE
5 ATTORNEY GENERAL IS NOT DILIGENTLY PROSECUTING, THAT THE
6 CITIZENS ARE NOT ALLOWED TO BRING AN ACTION BEFORE THE
7 UNITED STATES DOES WITHIN THAT 60-DAY PERIOD.

8 THE COURT: SO IT'S THE REASON THAT YOU
9 WANTED TO TAKE THE LEAD IS BECAUSE YOU DIDN'T WANT THESE
10 MAJOR ISSUES ABOUT THE INTERPRETATION OF THE TSCA AND
11 KEY REGULATIONS TO HAPPEN BETWEEN A PRIVATE PARTY AND A
12 GROUP OF OTHER PRIVATE PARTIES WITHOUT THE GOVERNMENT
13 KIND OF TAKING THE LEAD IN THOSE IMPORTANT ARGUMENTS?

14 MR. GLADSTEIN: BASICALLY, YES. AND THE
15 SUPREME COURT JURISDICTION OR PRECEDENCE SUPPORTS THAT,
16 YOUR HONOR, THAT WE -- THAT OUR SECTION WAS SET UP MANY
17 YEARS AGO TO TRY TO CONSIDER, YOU KNOW, AS SORT OF A
18 QUASI OFFICER OF THE COURT, AND THAT'S WHY WE ARE
19 TALKING ABOUT A MIDDLE ROAD. AND THE MIDDLE ROAD IS
20 THEY HAVE -- INHANCE HAS APPLIED AND THE EPA IS
21 REVIEWING THAT PROCESS.

22 AND SO THEY SAY, WELL, OKAY, END OF
23 STORY, YOUR CASE IS NOT RIPE, LET'S JUST LET THE EPA
24 COME TO ITS CONCLUSION. AND WHAT WE ARE SAYING IN TERMS
25 OF NOT BEING IN THE MIDDLE IS THAT DURING THIS PENDING

1 PERIOD THERE IS A VIOLATION. AND IT'S CLEAR FROM THE
2 STATUTE -- WE ARE SAYING TO -- WHAT WE ARE ASKING YOUR
3 HONOR IS THAT YOU ISSUE A DECLARATORY JUDGMENT THAT
4 ESTABLISHES THAT.

5 THE COURT: AND THEN WHAT?

6 MR. GLADSTEIN: AND THEN EPA IS
7 PROCEEDING TO DO ITS REVIEW, AND THE -- INHANCE JUST
8 ASKED FOR A SUSPENSION, AND THAT SUSPENSION WILL
9 CONCLUDE SEPTEMBER 1ST. AND THEN UNDER THE STATUTE, EPA
10 CAN ISSUE -- CAN EXTEND FOR UP TO 90 DAYS. SO WITHIN
11 THE NEXT THREE MONTHS, EPA IS GOING TO ISSUE A DECISION
12 ON THE SNUNS. AND THAT WILL THEN BECOME BASICALLY THE
13 FINAL AGENCY DETERMINATION ON THESE QUESTIONS.

14 NOW, SO YOUR QUESTION IS, WHY DIDN'T YOU
15 MOVE FOR INJUNCTIVE RELIEF EVEN THOUGH WE HAVE IT IN OUR
16 COMPLAINT? AND THE ISSUE IS THAT WE ARE HOPING THAT IF
17 THE COURT LOOKS AT THE ISSUES THE WAY THE UNITED STATES
18 IS LOOKING AT IT, THAT A FINDING OF LIABILITY WILL BE
19 ISSUED AND THAT WILL LEAD TO HELP IN A RESOLUTION OF THE
20 CASE. WE DON'T HAVE A GUARANTEE OF THAT, BUT THAT'S THE
21 FIRST STEP IN TERMS OF ANY INJUNCTIVE ANALYSIS ANYWAYS.
22 YOU HAVE TO FIND OUT IS THERE LIKELIHOOD OF SUCCESS ON
23 THE MERITS.

24 THE COURT: YOU DISAGREE WITH THE
25 INTERVENORS THAT THE INJUNCTION IS MANDATORY?

1 MR. GLADSTEIN: WELL, YOUR HONOR --

2 THE COURT: YOU HAVE TO, RIGHT?

3 MR. GLADSTEIN: I'M SORRY?

4 THE COURT: YOU HAVE TO DISAGREE WITH
5 THEM ON THAT, RIGHT?

6 MR. GLADSTEIN: YOUR HONOR, AGAIN, WE
7 HAVE NOT MOVED AT THIS POINT, BUT IF WE DO GET TO THE
8 POINT WHERE WE BELIEVE MOVING FOR INJUNCTIVE RELIEF IS
9 THE RIGHT THING TO DO, THEN WE BELIEVE THAT THE HILL
10 CASE, TVA VERSUS HILL, THAT OUR CASE, THAT TSCA IS
11 SIMILAR TO THE ENDANGERED SPECIES ACT, AND THAT IT
12 WOULD -- IT'S REQUIRED UNDER, AT LEAST FROM A
13 PRELIMINARY STANDPOINT -- IF YOU LOOK AT IT FROM
14 PRELIMINARY INJUNCTION, THERE IS NO MANUFACTURING BEFORE
15 AN ORDER IS ISSUED.

16 ONCE AN ORDER IS ISSUED, WE DON'T KNOW
17 WHAT THE ORDER IS GOING TO BE. IT'S POSSIBLE THAT THE
18 AGENCY CAN SAY, IT'S NOT AN UNREASONABLE RISK. BUT IF
19 THE AGENCY DETERMINES IT IS AN UNREASONABLE RISK AND
20 INHANCE DOES NOT COMPLY WITH THAT ORDER, THEN WE BELIEVE
21 AGAIN THAT TSCA SAYS THAT AN INJUNCTION IS WARRANTED IN
22 THAT SITUATION.

23 NOW, IF YOUR HONOR --

24 THE COURT: YOU JUST WROTE THE
25 INTRODUCTION OF MY OPINION FOR WHY THIS CASE IS NOT RIPE

1 JUST NOW, RIGHT?

2 MR. GLADSTEIN: I DID?

3 THE COURT: YES. YOU JUST EXPLAINED TO
4 ME WHY THE ADMINISTRATIVE ACTION IS GOING TO HAVE A
5 MATERIAL EFFECT ON THE OUTCOME ON THIS CASE.

6 MR. GLADSTEIN: IT WILL, BUT IT'S ALSO
7 TRUE THAT THEIR -- ALL OF THE PRONGS FOR LOOKING AT
8 RIPENESS ARE PRESENT NOW. THE PARTIES ARE ADVERSE,
9 THE -- YOU CAN CONCLUSIVELY DECIDE THE ISSUE OF
10 LIABILITY NOW, THAT'S A REAL DISPUTE.

11 YOU ARE GOING TO HEAR FROM MS. STETSON
12 AND MR. SELIGMAN AS TO WHETHER THE REGULATION, THE
13 LONG-CHAIN PFAS RULE IS CONSISTENT WITH THE STATUTE OR
14 NOT. I MEAN, THAT'S A REAL DISPUTE, AND IT WILL HAVE
15 UTILITY IN THAT IT CAN HELP TO RESOLVE THE CASE.

16 THE COURT: WHAT CASE?

17 MR. GLADSTEIN: THIS CASE, THE LIABILITY
18 FINDING.

19 THE COURT: SO THE GOVERNMENT HAS OFFERED
20 WHAT YOU CALL A MIDDLE GROUND, WHAT'S CALLED A
21 RELATIVELY SIMPLE PATH TOWARDS THE DECLARATORY JUDGMENT
22 RULING THAT YOU WANT. INHANCE HAS RAISED SEVERAL
23 DEFENSES THAT HAVE THE POTENTIAL TO -- I WOULD IMAGINE
24 FROM YOUR POINT OF VIEW -- WOULD HAVE THE POTENTIAL TO
25 CREATE A LOT OF PROBLEMS WITH THE EPA IF I AGREE WITH

1 ANY OF THEM. NONETHELESS, YOU WANT TO KEEP GOING. IT
2 SURPRISES ME, YOU KNOW? AND IT SEEMS VERY --

3 MR. GLADSTEIN: WELL, YOUR HONOR --

4 THE COURT: IT SEEMS VERY HYPOTHETICAL TO
5 THESE QUESTIONS, THE QUESTIONS THAT INHANCE IS RAISING,
6 NOT SO MUCH THE QUESTIONS THE GOVERNMENT IS ASKING
7 BECAUSE THE GOVERNMENT IS OFFERING A RELATIVELY
8 STRAIGHTFORWARD PATH. BUT THE QUESTIONS INHANCE IS
9 RAISING, DO THOSE REALLY NEED TO BE ANSWERED AT THIS
10 STAGE?

11 MR. GLADSTEIN: YOU MEAN THEIR
12 AFFIRMATIVE DEFENSES TO LIABILITY?

13 THE COURT: YES, BECAUSE I ASSUME INHANCE
14 IS RAISING ALL OF THOSE ISSUES AS PART OF THE REGULATORY
15 PROCESS AS WELL?

16 MR. GLADSTEIN: YES. SO ON THOSE
17 AFFIRMATIVE DEFENSES, MR. SELIGMAN IS VERY INTERESTED IN
18 SPEAKING TO THOSE, YOUR HONOR.

19 BUT AGAIN, I WOULD GO BACK TO THE 2016
20 AMENDMENTS THAT CONGRESS -- AND THIS AGAIN IS LIKE THE
21 ENDANGERED SPECIES ACT. THE ENDANGERED SPECIES ACT WAS
22 AMENDED IN 1973, EVEN THOUGH IT HAD FIRST BEEN ENACTED
23 IN 1969 TO STRENGTHEN THE REQUIREMENTS TO PREVENT
24 SPECIES FROM BEING ELIMINATED. AND THIS IS SIMILAR
25 HERE, THAT CONGRESS -- THE WILL OF CONGRESS IS

1 SOMETHING, WE BELIEVE, IS IMPORTANT.

2 THE COURT: WHY DIDN'T THE GOVERNMENT GO
3 FOR THE \$37,500 A DAY UNDER 2615?

4 MR. GLADSTEIN: RIGHT. SO THAT'S NOT
5 PRECLUDED. THAT'S AN ADMINISTRATIVE PENALTY THAT CAN GO
6 ON CURRENTLY AND COULD HAPPEN IN THE FUTURE. AND THEN
7 THEY CAN --

8 THE COURT: IT'S NOT PART OF THE
9 COMPLAINT?

10 MR. GLADSTEIN: RIGHT, BECAUSE IT'S
11 ADMINISTRATIVE. IT HAS TO -- THERE'S A SEPARATE
12 PROCEDURAL DUE PROCESS THERE WHERE THE EPA WOULD ASSESS
13 AN ADMINISTRATIVE PENALTY, ET CETERA, ET CETERA, ET
14 CETERA.

15 THE COURT: YOU DON'T RAISE IT AS PART OF
16 AN ENFORCEMENT ACTION LIKE THIS?

17 MR. GLADSTEIN: NO. I MEAN, THIS IS A
18 PRETTY UNUSUAL STATUTE. MOST OF THEM ALLOW FOR CIVIL
19 PENALTIES, YES.

20 THE COURT: ON THE RIPENESS FRONT, I AM
21 STUCK WITH THE 3RD CIRCUIT RIPENESS DECLARATORY JUDGMENT
22 LAW. WHAT ARE YOUR BEST CASES?

23 MR. GLADSTEIN: WELL, SO IF YOU LOOK AT
24 THE PEACHLUM DECISION. SO PEACHLUM IS --

25 THE COURT: 2003?

1 MR. GLADSTEIN: YES, YOUR HONOR. IT'S
2 333 F.3D 429 AT PAGE 435, 3RD CIRCUIT.

3 AND BASICALLY WHAT PEACHLUM SAYS IS THAT
4 THE STEP-SAVER ANALYSIS IS TAILORED TO ADDRESS THE
5 PRE-ENFORCEMENT ACTIONS. AND THE CASES THAT INHANCE HAS
6 RELIED ON, EVEN THOUGH THEY DON'T CITE DIRECTLY TO
7 STEP-SAVER, ARE RELYING ON STEP-SAVER. AND STEP-SAVER
8 WAS A PRE-ENFORCEMENT CASE THAT INVOLVED EFFORTS BY
9 NON-GOVERNMENTAL PLAINTIFFS TO REVIEW NON-FINAL AGENCY
10 ACTION.

11 HERE, THE U.S. IS ASKING THE COURT TO
12 HOLD INHANCE CURRENTLY LIABLE FOR VIOLATING THE
13 LONG-CHAIN PFAS RULE, WHICH IS A FINAL AGENCY ACTION.
14 AND SO -- AND THEN THEY CITE SOME OTHER CASES, A COUPLE
15 OF 3RD CIRCUIT CASES.

16 THE COURT: IT'S A FINAL AGENCY ACTION
17 THAT COMPLETELY MISSED THE ISSUE IN THIS CASE. AND THE
18 ACTUAL ENFORCEMENT ACTION THAT WILL ADDRESS THE FACTS OF
19 THIS CASE IS HAPPENING, THEREFORE MAKING THIS A
20 PRE-ENFORCEMENT SITUATION LIKE STEP-SAVER, RIGHT?

21 MR. GLADSTEIN: I'M SORRY, I WAS LOOKING
22 FOR THOSE CASES. COULD YOU SAY THAT AGAIN, YOUR HONOR?

23 THE COURT: WELL, TO SAY THAT THIS IS NOT
24 PRE- ENFORCEMENT BECAUSE THIS ENFORCEMENT IS PURSUANT TO
25 THE 2020 RULE, SO IN THAT SENSE IT'S POST ENFORCEMENT.

1 BUT THE UNIQUE FACTUAL SITUATION WE ARE DEALING WITH
2 HERE IS THAT THE RULE IN NO WAY FACIALLY ADDRESSES THE
3 SITUATION -- THE ACTUAL FACTS INHANCE IS DEALING WITH,
4 AND THAT REGULATORY ACTION IS HAPPENING RIGHT NOW, AS WE
5 SPEAK. SO ISN'T THIS A PRE-ENFORCEMENT SITUATION
6 SIMILAR TO STEP-SAVER?

7 MR. GLADSTEIN: WE DON'T THINK SO. I
8 MEAN, THE RULE APPLIES TO ALL USES, AND I THINK
9 MR. SELIGMAN CAN TALK ABOUT THAT.

10 THE COURT: IF STEP-SAVER APPLIES, CAN
11 YOU STILL WIN?

12 MR. GLADSTEIN: YES.

13 THE COURT: SO EXPLAIN WHY, ESPECIALLY
14 WITH RESPECT TO THE ADVERSITY OF THE PARTY'S INTEREST,
15 HOW -- UNDER STEP-SAVER, HOW DOES THE GOVERNMENT FARE ON
16 THAT?

17 MR. GLADSTEIN: I FEEL THAT'S THE
18 CLEAREST INSTANCE, YOUR HONOR. I MEAN, INHANCE, 200
19 MILLION CONTAINERS A YEAR, YOUR HONOR, AND THERE'S A
20 SIGNIFICANT ECONOMIC SITUATION THAT INHANCE IS VERY
21 CONCERNED ABOUT RELATED TO THAT, THAT'S THEIR INTEREST.

22 THE COURT: WHAT IF THE EPA SAYS THAT
23 IT'S NOT GOING TO BE THAT HARMFUL?

24 MR. GLADSTEIN: WELL, THAT'S RIGHT,
25 THAT'S A POSSIBILITY, YOUR HONOR. BUT THE WAY -- AGAIN,

1 GOING BACK TO THE CONGRESSIONAL INTENT THAT 2016 SHIFTED
2 THE BURDEN, THAT ALL THOSE APPLICATIONS HAD PILED UP AND
3 EPA COULD NOT DEAL WITH THEM, SO THERE WAS CONCERN BY
4 CONGRESS THAT ALL THESE CHEMICALS WERE GETTING INTO THE
5 MARKET THAT WERE HARMING PEOPLE AND THE ENVIRONMENT.
6 AND WHAT 2016 DID IS IT PUT A STOP TO THAT.

7 THE COURT: I GUESS IF -- IF YOU ARE
8 RIGHT ABOUT YOUR CENTRAL THEORY FOR DECLARATORY JUDGMENT
9 THAT YOU CAN JUST CUT A PATH STRAIGHT THROUGH THE
10 STATUTE AND GET ENFORCEMENT, YOUR ARGUMENT FOR RIPENESS
11 IS STRONG. THEY KIND OF GO HAND IN HAND, RIGHT?

12 BUT IF THE PATH IS NOT AS STRAIGHT, AS
13 YOU SAY IT IS, IF SOME OF INHANCE'S DIVERSIONS FROM THAT
14 PATH, IF YOU WILL, HAVE MERIT, THEN IT STARTS TO LOOK A
15 LOT LESS RIPE.

16 MR. GLADSTEIN: RIGHT, AND THAT'S -- THE
17 REASON WE ARE HERE TODAY IS THAT THIS IS A DIFFICULT
18 CASE, YOUR HONOR.

19 THE COURT: I SEE.

20 LET ME TALK TO MS. STETSON ABOUT
21 RIPENESS.

22 MR. GLADSTEIN: THANK YOU VERY MUCH, YOUR
23 HONOR.

24 MS. STETSON: GOOD MORNING, YOUR HONOR.

25 THE COURT: CAN YOU START ON THAT LAST

1 POINT OF IF I WERE TO AGREE WITH THE GOVERNMENT'S
2 CENTRAL THEORY OF HOW TO INTERPRET THE STATUTE, THEN THE
3 CASE IS PROBABLY ALSO RIPE, DON'T YOU THINK?

4 MS. STETSON: BEFORE I ANSWER THAT
5 QUESTION, I WOULD LIKE TO HAND SOMETHING UP TO YOU. AS
6 YOU SAID, THERE'S A LOT OF MOVING PIECES IN THIS CASE.
7 I HAVE A BRIEFING BOOK FOR YOU AND YOUR CLERK, IF I
8 COULD APPROACH?

9 THE COURT: SURE.

10 MS. STETSON: THANK YOU.

11 SO THE SHORT ANSWER TO THE QUESTION IS
12 YOU CAN ONLY DETERMINE IF THIS CASE IS RIPE IF YOU AGREE
13 WITH THE GOVERNMENT THAT THEY ARE CORRECT ON ALL OF OUR
14 DEFENSES THAT WE HAVE RAISED.

15 THE COURT: I THINK THAT'S RIGHT.

16 MS. STETSON: RIGHT.

17 IF YOU ARE THINKING ABOUT THIS IN TERMS
18 OF A ROUTES TO AN EXIT, I THINK THERE ARE TWO ROUTES.
19 ONE OF THEM IS THAT THE GOVERNMENT IS HERE TOO EARLY;
20 AND THE OTHER ONE IS THAT WE SHOULD NOT BE HERE AT ALL.

21 IN ORDER FOR THE GOVERNMENT TO OVERCOME
22 THOSE, I THINK THERE ARE TWO DIFFERENT ARGUMENTS THERE.
23 ONE OF THEM HAS TO DO WITH JUST THE NATURE OF RIPENESS
24 IN A DECLARATORY JUDGMENT ACTION ITSELF. WHAT YOU JUST
25 HEARD MR. GLADSTEIN SAY WAS ESSENTIALLY WHAT THEY ARE

1 LOOKING FOR IS AN OPINION ON A COMPONENT OF THIS CASE
2 THAT COULD BE USEFUL IN HELPING RESOLVE THIS CASE, I
3 THINK WAS THE PHRASE THAT HE USED.

4 THE OTHER WAY TO KIND OF PHRASE THAT IS
5 THAT IT'S AN ADVISORY OPINION. WHAT HE IS LOOKING FOR
6 IS AN OPINION ON LIABILITY THAT BEARS ON EXACTLY THE
7 SAME ISSUES THAT ARE IN FRONT OF THE AGENCY RIGHT NOW,
8 INCLUDING SOMETHING THAT DID NOT COME UP FOR THE FIRST
9 15 MINUTES OF ARGUMENT, WHICH IS WHAT THIS RULE IS
10 ACTUALLY CALLED. THIS RULE IS NOT CALLED THE LONG-CHAIN
11 PFAS RULE.

12 MR. GLADSTEIN WALKED UP TO WHAT THE RULE
13 IS ACTUALLY CALLED A COUPLE OF TIMES AND THEN CHANGED
14 HIS PHRASING. THIS IS A SIGNIFICANT NEW USE RULE.

15 THE COURT: BEFORE WE DIVE INTO
16 THAT THOUGH.

17 MS. STETSON: SURE.

18 THE COURT: DO YOU KNOW WHY -- I HAD
19 TROUBLE SHAKING LOOSE SOME OF THESE WHYS FROM THE
20 GOVERNMENT.

21 DO YOU KNOW WHY THE GOVERNMENT WOULD WANT
22 ME TO STEP IN FRONT OF THE EPA ON THESE LEGAL ISSUES?
23 THAT'S ODD TO ME.

24 MS. STETSON: ALL I CAN DO IS SPECULATE,
25 YOUR HONOR. I THINK IT WAS INTERESTING TO HEAR MR.

1 GLADSTEIN TALK ABOUT THE TIMING OF ALL OF THIS. BECAUSE
2 WHAT YOU HEARD MR. GLADSTEIN SAY WAS WHAT WHEN PEER AND
3 CEH SENT THEIR 60-DAY NOTICE LETTERS, THE WORD MR.
4 GLADSTEIN USED WAS THAT IT FORCED EPA TO ACT.

5 THE COURT: SURE.

6 MS. STETSON: BECAUSE, AS YOU SAID, EPA
7 AND DOJ WANTED TO GET OUT AHEAD OF THE CITIZENS GROUPS
8 IN TERMS OF CONTROLLING THE LITIGATION.

9 BUT THE QUESTION THAT YOU RAISED A NUMBER
10 OF TIMES TO MR. GLADSTEIN ABOUT WHETHER THERE HAS EVER
11 BEEN A CASE LIKE THIS, WHETHER THERE HAS EVER BEEN A
12 CIRCUMSTANCE WHERE, AS MR. GLADSTEIN TWICE CONCEDED,
13 NEITHER EPA NOR THE REGULATED ENTITY KNEW THAT THEIR
14 PARTICULAR PRODUCTION, NOT USE, BUT PRODUCTION OF PFAS
15 DURING THE FLUORINATION PROCESS WAS GOING TO BE COVERED
16 BY A SIGNIFICANT NEW USE RULE.

17 WHY WE ARE HERE IN THIS UNIQUE POSTURE AT
18 THIS STAGE I THINK IS ONLY BECAUSE APPARENTLY OF EPA'S
19 HAND BEING FORCED. THAT DOES NOT MAKE IT RIPE, AND THAT
20 CERTAINLY DOES NOT MAKE IT APPROPRIATE SUBSTANTIVELY TO
21 BE HERE. I THINK THIS IS AN OVERREACH, BOTH IN TERMS OF
22 JUMPING THE GUN ON TIMING, AND I THINK IT'S A
23 SIGNIFICANT SUBSTANTIVE OVERREACH IN TERMS OF THE
24 STATUTE AND REGULATIONS.

25 THE COURT: ON THE RIPENESS ISSUE, ONE OF

1 THE THINGS I COULD NOT QUITE FIGURE OUT FROM THE
2 BRIEFING BECAUSE SOME OF THE COMMENTS THAT WERE BEING
3 MADE ON BOTH SIDES ABOUT WHAT WAS GOING ON HAPPEN IN THE
4 REGULATORY PROCESS STRUCK ME AS A LITTLE SPECULATIVE,
5 BUT I NEED TO UNDERSTAND WHAT IS AT STAKE IN THE CURRENT
6 REGULATORY PROCESS? WHAT ARGUMENTS ARE BEING MADE, WHAT
7 COULD HAPPEN?

8 AND LET ME PUT IT TO YOU THIS WAY: GIVE
9 ME YOUR ABSOLUTELY MOST POWERFUL ONE, TWO OR THREE
10 WHATEVER REASONS OR EXAMPLES OF SOMETHING THAT COULD
11 VERY WELL HAPPEN IN THE REGULATORY PROCESS THAT SHOWS WE
12 ARE NOT RIPE RIGHT NOW IN THIS CASE.

13 MS. STETSON: I THINK YOU ALLUDED TO SOME
14 OF THEM EARLIER, YOUR HONOR. ONE OF THE THINGS THAT
15 COULD HAPPEN DURING THIS REGULATORY PROCESS IS THAT THE
16 AGENCY CONCLUDES, AS WE HAVE CONSISTENTLY MAINTAINED,
17 THAT THIS RULE, THE SIGNIFICANT NEW USE RULE, DOES NOT
18 APPLY TO A USE THAT HAS BEEN CONCEDEDLY GOING ON SINCE
19 THE 1980S. TAB FIVE OF YOUR BRIEFING BOOK IS THE U.S.
20 CONCEDING THAT FLUORINATION -- INHANCE HAS BEEN USING
21 FLUORINATION, THESE PROCESSES SINCE THE 1980S. THAT'S
22 ONE POSSIBILITY.

23 THE COURT: ISN'T THE EXPECTATION THAT
24 THE EPA HAS AN INWARD -- I DON'T KNOW WHAT THE THINGS
25 ARE CALLED, BUT IN RESPONSE TO THE SNUNS THAT EPA WOULD

1 GIVE YOU ITS LEGAL VIEW ON THAT QUESTION, IS THAT
2 EXPECTED?

3 MS. STETSON: YOU KNOW, IT'S DIFFICULT --
4 PART OF THE ISSUE HERE I THINK IS THAT IS A HIGHLY
5 UNUSUAL CASE. THE WAY THAT THESE THINGS USUALLY RESOLVE
6 IS, AS YOU SAID, WHEN A SIGNIFICANT NEW USE RULE ISSUES.
7 ONE OF THE THINGS THE AGENCY SAYS IS, WE ARE CONSULTING
8 THESE VARIOUS DATA SHEETS AND HOUSEHOLD USE CHARTS AND
9 CHEMICAL REGISTRIES TO DETERMINE WHEN AND HOW THESE
10 PARTICULAR CHEMICALS THAT WE ARE TARGETING ARE USED,
11 EMPHASIS ON USED, IN PRODUCTION.

12 IF THERE ARE ANY OUT THERE THAT WE MISSED
13 THAT YOU ARE USING IN PRODUCTION, PLEASE LET US KNOW.
14 AND THE REGULATED ENTITIES COME IN AND THEY SAY, WE USE
15 THIS PARTICULAR PFAS AS A SURFACTANT ON SEMICONDUCTORS.
16 WE USE THIS PARTICULAR PFAS IN PAINT OR LATEX OR
17 STICKERS, OR NAME ANY PARTICULAR USE THAT IS COVERED BY
18 THE SIGNIFICANT NEW USE RULE.

19 THIS IS UNUSUAL BECAUSE WHAT WE ARE
20 TALKING ABOUT IS NEITHER NEW OR A USE. SO WHAT WE END
21 UP HAVING TO DO AND WHAT THE AGENCY HAS HAD TO DO IS
22 ESSENTIALLY BACKFILL ITS WAY INTO AN ADMINISTRATIVE
23 PROCESS THAT DOES NOT FIT THE CIRCUMSTANCES AT ALL.

24 ONE OF THE THINGS THAT MR. GLADSTEIN SAID
25 IN RESPONSE TO YOUR FIRST QUESTION WHEN YOU ASKED WHY

1 ARE WE ARE HERE, HE SAID, WELL, THE STATUTE SAYS NO
2 MANUFACTURING MAY OCCUR BEFORE THE AGENCY UNDERGOES THIS
3 CONSIDERATION. THAT'S OUR POINT, IN A WAY. THE STATUTE
4 SAYS NO SIGNIFICANT USE -- NEW USE MAY OCCUR,
5 THEREFORE --

6 THE COURT: SORRY, JUST TO DRILL DOWN ON
7 IT THOUGH.

8 AM I TO UNDERSTAND THAT ONE THING THAT
9 MIGHT HAPPEN AT THE END OF THE EPA'S PROCESS IS THE EPA
10 MIGHT SAY, WELL, WE HAVE LOOKED AT IT AND ACTUALLY WE
11 AGREE THAT THIS CAN'T BE A SIGNIFICANT NEW USE BECAUSE
12 IT WAS ONGOING? IS THAT A POSSIBILITY?

13 MS. STETSON: I THINK IT'S A POSSIBILITY,
14 AND THE ONLY REASON I AM HEDGING AND EXPLAINING A LITTLE
15 BIT OF A BACKGROUND IS BECAUSE NEITHER WE NOR EPA APPEAR
16 TO HAVE ENCOUNTERED THIS PARTICULAR TYPE OF PROCEEDING
17 BEFORE.

18 THE COURT: AND COULD THE EPA SAY, WELL,
19 YOU KNOW, WE LOOKED AT THIS. ACTUALLY IT'S AN IMPURITY,
20 IT FALLS UNDER THE IMPURITY EXCEPTION SO --

21 MS. STETSON: THEY COULD SAY THAT AS
22 WELL.

23 WHAT YOU ALSO HEARD -- SORRY TO
24 INTERRUPT.

25 THE COURT: AND THEN COULD THOSE

1 THINGS -- EVEN IF THE EPA DOES NOT AGREE WITH THOSE
2 THINGS, COULD THAT BE THE OUTCOME OF A POTENTIAL APPEAL
3 FROM THAT?

4 MS. STETSON: ABSOLUTELY. THAT'S THE
5 OTHER THING YOU DIDN'T HEAR MR. GLADSTEIN SAY THIS
6 MORNING IS THAT WHAT THE NORMAL PROCESS FOR THIS IS IF
7 THERE IS THIS KIND OF ACTION, AND EPA ISSUES AN ORDER
8 WHICH MAY OCCUR DEPENDING ON TIMING AND WHETHER THERE IS
9 ANOTHER SUSPENSION IN PLACE SOME MONTHS FROM NOW IS THAT
10 INHANCE WOULD HAVE THE RIGHT TO FILE ITS OWN PETITION
11 FOR REVIEW IN A COURT OF APPEALS THAT IS APPROPRIATE FOR
12 THAT PETITION, AND ALL OF THESE ISSUES THAT WE ARE
13 TALKING ABOUT ARE GOING TO GET LITIGATED AT THAT POINT.
14 ALL OF THESE LEGAL PREDICATES ARE GOING TO GET LITIGATED
15 AT THAT POINT. THAT'S NOT SOMETHING THAT YOU HEARD
16 MR. GLADSTEIN SAY.

1 PRACTICAL MATTER TO THINK ABOUT, AND I THINK ONE OF YOUR
2 QUESTIONS EARLIER MADE REFERENCE TO THIS AS WELL -- IF
3 THEY HAD KNOWN, INHANCE COULD HAVE SUBMITTED ITS NOTICE
4 TO THE AGENCY: WE HAVE AN ONGOING USE; IT PRODUCES
5 PFAS; THEREFORE, WE ARE EXEMPT FROM THIS RULE. BECAUSE
6 EPA SPECIFICALLY SAYS OVER AND OVER AGAIN, WE CANNOT
7 REGULATE AN ONGOING USE UNDER THE SIGNIFICANT NEW USE
8 RULE.

9 SO THIS IS NOT -- WE ARE NOT HERE
10 DESPITE --

11 THE COURT: THIS IS THE QUESTION I AM
12 GOING TO HAVE FOR MR. SELIGMAN, BUT I, FOR THE LIFE OF
13 ME, COULD NOT FIGURE OUT THE PHRASE "ONGOING USE."
14 WHERE IS THAT FROM? IT POPS UP IN THE INDIVIDUAL
15 RULEMAKINGS, RIGHT, AND I THINK IN THE GOVERNMENT BRIEF
16 I FOUND ONE LINE -- TOOK ME A WHILE TO FIND IT. I FOUND
17 ONE LINE WHERE THE GOVERNMENT SAID, CONSISTENT WITH ITS
18 LONGSTANDING PRACTICE, EPA STATED IT WOULD NOT DESIGNATE
19 AS A SIGNIFICANT NEW USE ANY BLAH, BLAH, BLAH, THAT WERE
20 ONGOING USES, RIGHT? LONGSTANDING PRACTICE, THAT WAS
21 THE CLOSEST I COULD FIND TO A SOURCE OF A CONCEPT OF AN
22 ONGOING USE.

23 AND IT SEEMS TO ME THAT ONE OF THE
24 DISPUTES WE ARE HAVING HERE IS -- I THINK I AM GOING TO
25 HEAR FROM MR. SELIGMAN SOME VERSION OF, WELL, IT'S ALL

1 IN THE EPA'S DISCRETION AND WE DEAL WITH THESE ONGOING
2 USES AND WE DESIGNATE THEM FOR A CERTAIN REASON.

3 BUT I ASSUME WHAT I AM GOING TO HEAR FROM
4 YOU, FROM INHANCE, IS YES, ONGOING USE IS THE OPPOSITE
5 OF SUBSTANTIAL NEW USE BECAUSE THAT'S HOW THE STATUTE
6 WORKS.

7 IS THAT RIGHT?

8 MS. STETSON: THAT'S RIGHT. THE SHORT
9 ANSWER IS THAT'S RIGHT.

10 THE LONGER ANSWER IS THERE'S A RESPONSE
11 TO A COMMENT. IF YOU LOOK IN THE DOJ'S APPENDIX TO ITS
12 MOTION FOR SUMMARY JUDGMENT, WHICH IS DOCKET 37-1,
13 TOWARD THE END OF THAT APPENDIX THERE IS SEVERAL PAGES
14 OF RESPONSES TO COMMENTS. AND ONE OF THE COMMENTS
15 ACTUALLY ASKS IS THERE A STANDARD DEFINITION OF ONGOING
16 USE?

17 AND THE RESPONSE TO THE COMMENT SAYS,
18 APPRECIATE YOUR QUESTION. ONE OF THE THINGS THAT WE
19 LOOK AT IS ONGOING USE BECAUSE EPA IS PROHIBITED FROM
20 REGULATING ONGOING USES UNDER A SIGNIFICANT NEW USE
21 RULE.

22 SO IT DOES NOT GET TO YOUR QUESTION WHERE
23 THIS COMES FROM, BUT EPA HAS BEEN VERY CLEAR THAT IF
24 THIS IS AN ONGOING USE, THEY ARE PROHIBITED FROM
25 REGULATING IT. SO WHAT WE ARE CAUGHT IN IS THIS BIZARRE

1 KIND OF TEMPORAL CATCH-22. EPA HAS NOW TWICE CONCEDED
2 THAT WE DIDN'T KNOW IN 2015 THAT WE WERE GENERATING
3 THESE MINUTE AMOUNTS OF PFAS AS AN IMPURITY -- AND WE
4 CAN TALK ABOUT IMPURITIES WHEN THE TIME IS RIGHT -- AS
5 PART OF ITS FLUORINATION PROCESSES THAT HAVE BEEN AROUND
6 FOR DECADES.

7 BUT BECAUSE WE DIDN'T KNOW AND DIDN'T
8 RAISE OUR HAND AND SAY THAT THIS IMPURITY IS APPARENTLY
9 A USE UNDER EPA'S NEW INTERPRETATION OF SIGNIFICANT NEW
10 USE, WE ARE NOW A NEW USE DESPITE BEING AROUND SINCE
11 1983. THAT --

12 THE COURT: BUT IN EPA'S PROCESS OF
13 PUBLISHING THE PROPOSED RULE, GETTING EVERYONE AROUND
14 THE TABLE TO TALK ABOUT THE ONGOING USES AND SORT THINGS
15 OUT AND EVALUATE AT THAT TIME, IT'S A VERY HEALTHY THING
16 FROM A REGULATORY POINT OF VIEW, IT'S GOOD FOR EVERYONE.

17 IT DOES NOT SEEM TO ME THAT -- IT WOULD
18 BE GREAT, IT SEEMS TO ME THERE COULD BE A LOT OF
19 PROBLEMS WITH LIVING IN A REGIME WHERE YOU DON'T HAVE TO
20 COME TO THE TABLE, AND IF YOU KNOW THAT YOU HAVE AN
21 ONGOING USE BECAUSE YOU WERE USING IT BEFORE, YOU CAN
22 JUST BLOW THE WHOLE THING OFF AND BE UNREGULATED. AND
23 IF THEY CATCH YOU LATER, YOU SAY, TOO BAD, THAT WAS AN
24 ONGOING USE. THAT DOES NOT SEEM LIKE A GOOD THING.

25 MS. STETSON: I THINK THERE ARE A COUPLE

1 OF DIFFERENT RESPONSES. THE FIRST IS -- AND THIS IS
2 WHERE WE START HONING IN ON THE QUESTION OF WHAT IS A
3 USE.

4 WHAT EPA DID IN ITS PROPOSED RULE AND
5 AGAIN IN ITS FINAL RULE, IT SAYS YOU MANUFACTURERS, AND
6 THERE'S ACTUALLY A CODE THAT I THINK IS CALLED THE NAICS
7 CODE, WHICH SAYS HERE ARE THE INDUSTRIES THAT ARE LIKELY
8 TO BE EFFECTED BY THIS BECAUSE YOU, THESE INDUSTRIES,
9 CHEMICAL MANUFACTURING, CARPET MANUFACTURERS, SOME SORTS
10 OF APPAREL MANUFACTURER, YOU USE PFAS, YOU ACTUALLY ADD
11 OR APPLY PFAS TO YOUR PROCESSES IN ORDER TO PRODUCE A
12 PARTICULAR PRODUCT OR A PARTICULAR CHEMICAL. SO YOU
13 MANUFACTURERS ARE ON NOTICE THAT THIS SIGNIFICANT NEW
14 USE RULE IS GOING TO APPLY TO YOU. WE ARE GOING TO
15 CHECK OUR WORK AND WE ARE GOING TO LOOK AT THOSE DATA
16 LISTS THAT I MENTIONED EARLIER, THE LISTS OF HOUSEHOLD
17 GOODS THAT USE PARTICULAR CHEMICALS AND SO FORTH.

18 AND IF YOU LOOK AT THE FINAL RULE, AND
19 THIS IS TAB THREE OF THE BRIEFING BOOK, THE FINAL RULE
20 ON PAGE 45119, THIS GIVES YOU AN EXAMPLE OF WHAT EPA
21 CONSIDERS USES. IF YOU LOOK AT COLUMN ONE, THEY HAVE A
22 WHOLE LIST OF HERE ARE THE USES THAT WE IDENTIFY OR
23 RECOGNIZE AS ONGOING. AMONG THEM, USE OF, TWO,
24 PROPIONIC ACID AS A COATING OR COMPONENT OF A
25 HYDROPHOBIC OR OLEOPHOBIC COATING OR BARRIER; USE OF

1 SALINE AS A SURFACE TREATMENT; USE OF OCTANOIC ACID; USE
2 OF PROPANOIC ACID. ALL OF THESE USES ARE ACTUALLY USES.
3 THE REASON THAT A MANUFACTURER KNOWS THAT IT IS USING
4 THESE PFAS IS BECAUSE IT IS USING THESE PFAS.

5 IN ORDER FOR INHANCE TO HAVE KNOWN THAT
6 IT WAS PRODUCING PFAS -- AND WE NOW HAVE EPA CONCEDING
7 THAT INHANCE DIDN'T KNOW, SO MAYBE THIS DOES NOT HAVE TO
8 BE A PART OF THE CONVERSATION -- BUT EPA WOULD HAVE
9 NEEDED TO SAY SOMETHING IN THIS RULE THAT IT NEVER DID,
10 WHICH IS IF YOU EVEN THINK THAT YOU MAY PRODUCE, NOT
11 USE, BUT PRODUCE PFAS AS AN IMPURITY OR BYPRODUCT IN
12 YOUR PROCESSES, YOU NEED TO TEST, AND YOU NEED TO SPEAK
13 NOW OR FOREVER HOLD YOUR PEACE. YOU WILL FIND NONE OF
14 THAT IN THE PROPOSED RULE, THE SUPPLEMENTAL RULE OR THE
15 FINAL RULE.

16 THE COURT: THEY COULD HAVE DONE THAT THE
17 MINUTE AFTER THEY GOT THE REPORT FROM THE GROUPS WHO DID
18 THE TESTING OF THE PESTICIDE, THE MINUTE AFTER THEY GOT
19 THAT REPORT THEY COULD HAVE ISSUED THAT PROPOSED RULE.

20 MS. STETSON: ABSOLUTELY.

21 THE COURT: RIGHT?

22 MS. STETSON: YES, THEY COULD HAVE. AND
23 THAT'S THE SHORT ANSWER TO YOUR QUESTION TO MR.
24 GLADSTEIN EARLIER IS THEY ABSOLUTELY COULD HAVE DONE
25 THAT, BUT THEY DIDN'T. AND I THINK THE REASON THEY

1 DIDN'T IS BECAUSE THEY ARE TRYING TO REACH HERE AND
2 REGULATE SOMETHING THAT IS SUBJECT TO REGULATION IN ANY
3 NUMBER OF WAYS. INHANCE'S PROCESSES ARE SUBJECT TO ALL
4 MANNER OF REGULATION: CLEAN AIR ACT, CLEAN WATER ACT,
5 OSHA, YOU NAME IT.

6 WHAT THEY ARE NOT SUBJECT TO IS A
7 SIGNIFICANT NEW USE RULE FOR A USE THAT HAS BEEN AROUND
8 SINCE THE 1980S.

9 AND ONE OF THE THINGS THAT I WANT TO
10 POINT OUT, JUST ON THAT USE IF I COULD, ONE MORE POINT.
11 IF YOU LOOK AT APPENDIX PAGE 246, ALSO OF THE
12 GOVERNMENT'S APPENDIX IN ITS MOTION TO DISMISS, YOU WILL
13 SEE, THIS IS THE PUBLICATION THAT CAME OUT IN FEBRUARY
14 OF '23 AFTER INHANCE SUBMITTED ITS SNUNS TO THE AGENCY.
15 THE AGENCY HAS TO PUBLISH A LIST OF CHEMICALS THAT HAD
16 BEEN IDENTIFIED.

17 PAGE 246 OF THAT IS REALLY TELLING,
18 BECAUSE WHAT IT SAYS IS THERE'S THIS HUGE LIST OF
19 CHEMICALS, AND IT SAYS, YOU KNOW, HERE IS PROPANOIC ACID
20 FOR USE AS A SURFACTANT COATING SUBMITTED BY ENTITY X.
21 AND IF YOU LOOK DOWN THAT PAGE, THEN YOU GET TO THE
22 SNUNS THAT WERE SUBMITTED BY INHANCE. AND UNLIKE ANY
23 OTHER USE, WHAT THAT PAGE SAYS IS THESE PFAS HAVE NO
24 FUNCTION OR APPLICATION. THESE PFAS HAVE NO FUNCTION OR
25 APPLICATION.

1 THERE IS NO USE ASSOCIATED WITH THESE
2 PFASES. SO WHAT THESE ARE AT THE VERY BOTTOM IS AN
3 IMPURITY THAT WAS UNDISCOVERED UNTIL RECENTLY. AND WHAT
4 EPA IS TRYING TO DO HERE IS TO REGULATE THIS AS A USE
5 AND TO TAG INHANCE WITH SOMETHING THAT IT DID NOT KNOW
6 AT THE POINT WHERE IT COULD HAVE RAISED ITS HAND.

7 THE COURT: I UNDERSTAND THAT. WE WILL
8 MAYBE COME BACK AND SPEND A LITTLE TIME ON THAT.

9 WOULD YOU AGREE, THOUGH, WITH REGARD TO
10 THIS ENFORCEMENT ACTION THAT WE ARE IN HERE, GENERALLY
11 SPEAKING THAT ENFORCEMENT POWER EXISTS. LIKE LET'S
12 SUPPOSE SOMEBODY REALLY DID START DOING SOMETHING NEW
13 WITH PFAS, AND THEY WERE, LIKE, WE DON'T CARE ABOUT THE
14 EPA, WE ARE JUMPING ON THE MARKET. THEN WE COULD BE
15 HERE FOR THIS, RIGHT?

16 MS. STETSON: I THINK YOU COULD, BECAUSE
17 THEN MR. GLADSTEIN WOULD NOT HAVE TO HAVE CHOSEN HIS
18 WORDS SO CAREFULLY, BECAUSE THEN YOU WOULD HAVE A
19 SITUATION WHERE THE MANUFACTURER WAS ACTUALLY
20 MANUFACTURING A CHEMICAL FOR A SIGNIFICANT NEW USE
21 WITHOUT HAVING GONE FIRST TO EPA AND SUBMITTED A NOTICE.

22 BUT HERE YOU HAVE AN ONGOING
23 MANUFACTURING THAT EPA CAME TO US WITH A NOTICE OF
24 VIOLATION DECADES AFTER WE STARTED AND SAID, WE THINK
25 THAT YOU ARE ENGAGING IN A SIGNIFICANT NEW USE.

1 THEREFORE, YOU NEED TO STOP YOUR PROCESSES.

2 STOPPING THESE PROCESSES, JUST TO GET
3 PRACTICAL ABOUT THIS, AND MR. GLADSTEIN ACTUALLY
4 ACKNOWLEDGED THIS, STOPPING THESE PROCESSES BANKRUPTS
5 INHANCE, TO PUT IT AS BLUNTLY AS I CAN. THIS WILL PUT
6 THIS COMPANY OUT OF BUSINESS. AND THE IRONY --

7 THE COURT: WELL, THE GOVERNMENT
8 APPARENTLY DOES NOT WANT AN INJUNCTION.

9 MS. STETSON: WELL, STOPPING THE
10 PROCESSES HAS CERTAIN, AS I THINK MR. GLADSTEIN ALLUDED
11 TO, HAS CERTAIN LEVERAGE EFFECTS ON A COMPANY LIKE THIS.

12 THE NOTION THAT THIS COULD ALL HAVE BEEN
13 AVOIDED IN 2015 IF THE GOVERNMENT HAD BOTH INTERPRETED
14 THE RULE AS IT NOW IS AND HAD TOLD INHANCE THAT IT
15 NEEDED TO TEST TO MAKE SURE THAT IT DIDN'T HAVE PFAS, IT
16 WAS GOING TO CONSIDER BYPRODUCTS IN ITS PRODUCTS, THAT
17 ALL COULD HAVE BEEN AVOIDED BY INHANCE JUST SUBMITTING A
18 NOTICE AND SAYING, WE ARE AN ONGOING USE, WE ARE NOT
19 SUBJECT TO THE RULE.

20 YOU WILL PROBABLY HEAR IT A LOT --
21 CERTAINLY YOU HEARD A LOT IN THE BRIEFS AND IN THE
22 ATTACHMENTS ABOUT PFAS. YOU HAVE READ A LOT IN THE NEWS
23 ABOUT PFAS LATELY.

24 THE COURT: AND THAT'S LARGELY IRRELEVANT
25 TO WHAT WE ARE ACTUALLY DISCUSSING HERE.

1 MS. STETSON: IT IS, IN FACT. BUT THE
2 ONE TAKEAWAY FROM ALL OF THAT IS THAT WE ARE NOT HERE
3 TALKING ABOUT A BAN ON PFAS, WE ARE TALKING ABOUT
4 WHETHER AND HOW TO REGULATE CERTAIN PRODUCTION OF PFAS.

5 THE COURT: THERE'S ACTUALLY A QUESTION I
6 HAVE FOR YOU IS -- JUST BECAUSE THE TOXIC SUBSTANCE
7 CONTROL ACT IS, YOU KNOW, WHAT WE ARE READING AND
8 LARGELY FOR THE FIRST TIME AS PART OF THIS CASE IS -- SO
9 I DON'T KNOW ABOUT OTHER PARTS OF THE REGULATORY
10 APPARATUS THAT MAY BE RELEVANT.

11 WHAT IS SUPPOSED TO HAPPEN WHEN THERE HAS
12 BEEN A PROCESS THAT HAS BEEN GOING ON FOR A REALLY LONG
13 TIME AND THEN IT'S DISCOVERED, AS OFTEN HAPPENS, IT'S
14 DISCOVERED THAT THAT PROCESS IS PRODUCING SOMETHING THAT
15 IS BAD FOR US. WHAT IS SUPPOSED TO HAPPEN?

16 MS. STETSON: I THINK THE FIRST ORDER OF
17 RESPONSE IS WHAT CAN'T HAPPEN IS YOU CAN'T REGULATE THAT
18 AS A SIGNIFICANT NEW USE. WHAT OFTEN DOES HAPPEN -- AND
19 I DON'T KNOW ABOUT SUPPOSED TO, IT'S PROBABLY A BETTER
20 QUESTION FOR THE GOVERNMENT. BUT I DO KNOW IF YOU LOOK
21 AT THE PROPOSED RULE, THE 2015 RULE AT TAB THREE OF YOUR
22 BRIEFING BOOK, ONE OF THE THINGS IT TALKS ABOUT IS A
23 CONSORTIUM THAT THE EPA FORMED WITH ABOUT EIGHT
24 DIFFERENT COMPANIES, INCLUDING DUPONT, INCLUDING SOME
25 OTHER BRAND NAMES, THAT WERE PRODUCING PFOA. AND THOSE

1 COMPANIES AND EPA COMMITTED TO REDUCING AND EVENTUALLY
2 ELIMINATING THEIR PRODUCTION MANUFACTURER IMPORT OF THAT
3 PARTICULAR --

4 THE COURT: WORKING TOGETHER?

5 MS. STETSON: EXACTLY, YES.

6 SO IN SITUATIONS WHERE THERE IS AN
7 ONGOING USE OR AN ONGOING MANUFACTURER OF A SUBSTANCE
8 THAT IS THEN FOUND TO BE TOXIC, EPA HAS SHOWN US WHAT
9 HAS BEEN DONE, WHICH IS THAT IT GETS THOSE COMPANIES
10 TOGETHER AND IT FINDS A COMMITMENT AMONG THOSE COMPANIES
11 TO ELIMINATE THE PRODUCTION OF THAT PARTICULAR
12 SUBSTANCE, SO THAT'S CERTAINLY ONE WAY TO DO IT.

13 THE COURT: WHAT IS INHANCE TELLING --
14 WHETHER IT'S EPA OR THE PUBLIC, WHAT IS INHANCE SAYING
15 ABOUT HOW IT'S DEALING WITH THE SITUATION ON A TECHNICAL
16 AND TOXIC SUBSTANCE FRONT?

17 MS. STETSON: I THINK WHAT INHANCE HAS
18 CONSISTENTLY MAINTAINED -- AND THERE ARE A FEW DIFFERENT
19 POINTS HERE -- ONE OF THEM IS THE AMOUNT OF PFAS THAT WE
20 ARE WE ARE TALKING ABOUT IS MINISCULE. YOU CAN FIND
21 THIS IN SOME OF THE TESTING AND OTHER SUBMISSIONS IN THE
22 RECORD. WE ARE TALKING ABOUT A MINISCULE AMOUNT OF
23 PFAS. THAT'S POINT ONE.

24 POINT TWO IS ONE OF THE REASONS THAT
25 FLUORINATION EXISTS -- AND YOU CAN FIND THIS IN SOME OF

1 THE SNUNS SUBMISSIONS THAT ARE IDENTIFIED AS APPENDIX
2 MATERIALS -- ONE OF THE REASONS THAT FLUORINATION EXISTS
3 IS TO ENSURE THAT MATERIALS LIKE GAS, LIKE OTHER HIGH
4 VOLATILITY MATERIALS DON'T --

5 THE COURT: I'M SURE THE FLUORINATION OF
6 PLASTIC SURFACES IS POTENTIALLY WORSE?

7 MS. STETSON: IT'S EITHER THAT THOSE
8 SUBSTANCES ESCAPE AND CAUSE HUGE ISSUES, INCLUDING
9 TRIGGERING EMISSION PROBLEMS WITH EPA, OR YOU PUT
10 EVERYTHING IN A METAL CONTAINER.

11 THE RISK HERE THAT WE ARE BALANCING IS
12 AGAINST A FAR GREATER RISK IF YOU WERE, AS YOU MENTIONED
13 EARLIER, TO PUT SOMETHING IN NON-FLUORINATED CONTAINERS.
14 AND THAT'S POINT NUMBER TWO.

15 POINT NUMBER THREE IS, AGAIN, ONE TO
16 TIMING AND SUBSTANCE HERE. THIS PARTICULAR RULE SIMPLY
17 DOES NOT APPLY TO THESE ONGOING USES AT THIS TIME FOR
18 THIS PARTICULAR IMPURITY THAT IS BEING GENERATED.

19 THE COURT: OKAY. I WANT TO MOVE ON A
20 LITTLE BIT MORE TO THE MERITS, BUT I WANT TO TALK TO THE
21 GOVERNMENT AGAIN.

22 MS. STETSON: OKAY.

23 MR. SUSSMAN: YOUR HONOR, CAN I BE HEARD
24 ON THESE ISSUES YET?

25 THE COURT: NOT YET.

1 MR. SUSSMAN: THANK YOU.

2 MR. SELIGMAN: GOOD MORNING, YOUR HONOR.

3 JONAH SELIGMAN ON BEHALF OF THE UNITED STATES.

4 I'D LIKE TO --

5 THE COURT: LET'S START WITH SIGNIFICANT
6 NEW USE VERSUS ONGOING USE. AND EDUCATE ME ON THIS
7 PHRASE, ONGOING USE. WHERE DID IT COME FROM; WHAT DOES
8 IT MEAN; WHERE IS IT WRITTEN DOWN WHAT IT MEANS; AND HOW
9 DOES IT INTERLOCK WITH THE STATUTORY PHRASE, SIGNIFICANT
10 NEW USE?

11 MR. SELIGMAN: YES. SO ONGOING USE IS A
12 TERM THAT THE AGENCY HAS DISCUSSED IN REGULATIONS GOING
13 BACK DECADES. AND EPA DETERMINES THAT AN ONGOING USE IS
14 NOT ONE THAT CAN BE A SIGNIFICANT NEW USE UNDER
15 SITUATION 5A OF THE STATUTE.

16 THE COURT: SO IS AN ONGOING USE THE
17 OPPOSITE OF THE SIGNIFICANT NEW USE?

18 MR. SELIGMAN: AN ONGOING USE IS ONE THAT
19 IS NOT NEW AND, THEREFORE, IT WOULD NOT BE SUBJECT TO
20 SIGNIFICANT NEW USE RULE TO BE EXEMPT. AN ONGOING USE
21 IS ONE THAT PREDATES THE DATE OF THE PROPOSAL OF THE
22 RULE, AND IT IS CONTINUING DURING THE RULEMAKING PERIOD.

23 THE COURT: AND WHY DOES THE EPA
24 RECOGNIZE ONGOING USES?

25 MR. SELIGMAN: I BELIEVE IT'S BASED ON

1 THE AGENCY'S INTERPRETATION OF THE WORD "NEW" AS IT IS
2 USED IN SECTION 5A.

3 THE COURT: WELL THEN WHY IS INHANCE
4 WRONG IN ITS ARGUMENT?

5 MR. GLADSTEIN: SO UNDER SECTION 5A, YOUR
6 HONOR, FOR THE TEXT OF THE STATUTE, A NEW -- WHICH IS
7 SECTION 5A BEING THE SOURCE OF EPA'S AUTHORITY TO
8 PROMULGATE SIGNIFICANT NEW USE RULES --

9 THE COURT: THE TOXIC SUBSTANCE CONTROL
10 ACT SECTIONS ARE NOT -- I DON'T LIVE AND BREATHE THOSE.
11 IS IT 2604?

12 MR. SELIGMAN: YES, SIR. YOUR HONOR, IT
13 IS FOUND AT 15 U.S.C., SECTION 2604(A) REFERS TO A
14 DETERMINATION BY THE ADMINISTRATOR, THAT IS THE EPA,
15 THAT A USE OF A CHEMICAL SUBSTANCE IS A SIGNIFICANT NEW
16 USE.

17 THE SENTENCE STRUCTURE MAKES CLEAR THAT
18 IT IS FOR THE AGENCY TO DETERMINE WHETHER A USE IS
19 SIGNIFICANT AND WHETHER IT IS NEW. EPA DOES -- TAKING
20 SIGNIFICANCE FIRST, EPA DOES THIS BY CONSIDERING THE
21 DEVELOPING STATUTORY FACTORS WHICH ARE WEIGHED OUT IN
22 SECTION (5)(B), 2604(B) IN CONSIDERING ALL OTHER
23 RELEVANT FACTORS.

24 WITH REGARD TO THE WORD "NEW," A USE IS
25 NEW TO THE AGENCY IF IT IS ONE THAT WAS NOT KNOWN TO BE

1 EXISTING TO THE AGENCY AT THE TIME OF THE RULEMAKING
2 BASED ON THE REASONABLY AVAILABLE INFORMATION.

3 THE COURT: WHERE DID YOU GET THAT
4 DEFINITION YOU JUST SAID FROM?

5 MR. SELIGMAN: YOUR HONOR, I THINK THAT'S
6 BASED ON THE TEXT OF 5A AND IF YOU READ THE STATUTE AS A
7 WHOLE, IN PARTICULAR SECTION 26(K) OF TSCA, 15 U.S.C.
8 2625(K) --

9 THE COURT: SLOWER, SORRY.

10 MR. SELIGMAN: SURE.

11 15 U.S.C. SECTION 2625(K) REQUIRES THE
12 EPA IN CARRYING OUT SECTION 5 OF THE STATUTE, WHICH
13 AGAIN IS CODIFIED AT SECTION 2604, SO IT MANDATES THE
14 EPA IN CARRYING OUT 15 U.S.C., SECTION 2604, CONSIDER
15 ALL INFORMATION AS REASONABLY AVAILABLE TO IT.

16 IN EXECUTING THAT MANDATE, YOUR HONOR,
17 EPA, WHEN IT ENGAGES IN THE SNUR RULEMAKING PROCESS, IT
18 SOLICITS COMMENTS, DETERMINES WHETHER A USE IS ONGOING,
19 I.E., ONE THAT IS NOT NEW BECAUSE IT IS ONE THAT THE
20 AGENCY DOES NOT KNOW TO BE EXISTING AT THE TIME OF THE
21 RULEMAKING. IF THE AGENCY CAN CONFIRM THAT, IN FACT,
22 THE USE IS ONGOING, IS NOT NEW, THAT RULE -- EXCUSE
23 ME -- THAT USE IS EXEMPT, WHICH IS CONSISTENT WITH
24 SECTION -- 15 U.S.C. 2625(K).

25 AND ADDITIONALLY, YOUR HONOR, THE PURPOSE

1 OF --

2 THE COURT: SO IF A USE IS OUTSIDE THE
3 REALM OF REASONABLY AVAILABLE INFORMATION TO THE EPA, IT
4 IS NOT ONGOING? OR IT CANNOT BE -- OR IT IS NECESSARILY
5 NEW -- IT BECOMES NEW AT THE MOMENT THAT THAT REASONABLY
6 AVAILABLE INFORMATION COMES INTO EXISTENCE THAT THEN IT
7 BECOMES NEW AT THAT MOMENT?

8 MR. SELIGMAN: WHEN THE AGENCY BECOMES
9 AWARE OF A USE BASED ON A REASONABLY --

10 THE COURT: MR. GLADSTEIN THOUGHT I WAS
11 RIGHT ON THAT ONE. HE IS NODDING BACK THERE.

12 MR. SELIGMAN: I'M SURE HE IS RIGHT THEN.

13 IF AN AGENCY IS AWARE OF A USE BASED ON
14 REASONABLY AVAILABLE INFORMATION, THAT USE IS NOT NEW,
15 IT'S ONGOING, WHICH IS CONSISTENT WITH THE REQUIREMENTS
16 UNDER 2625(K). IT'S ALSO CONSISTENT WITH SECTION 2 OF
17 THE STATUTE, TSCA'S POLICY.

18 THE COURT: TWO? SORRY.

19 MR. SELIGMAN: 15 U.S.C. 2601, YOUR
20 HONOR.

21 THE COURT: OH, TSCA, T-S-C-A, TSCA?

22 MR. GLADSTEIN: TSCA, SORRY, TOXIC
23 SUBSTANCE CONTROL ACT. IT'S REFERRED TO AS TSCA.

24 THE COURT: IT WAS RATTLING AROUND IN THE
25 BACK OF MY HEAD, AND I HEARD YOU SAY THAT WORD A COUPLE

1 OF TIMES. IT'S NEW JARGON TO ME, THIS WHOLE THING.

2 MR. SELIGMAN: SO UNDER THAT PROVISION
3 WHICH ANNOUNCES THE POLICY AND PURPOSE OF THE STATUTE
4 WHICH MADE CLEAR THAT IT IS THE POLICY OF THE UNITED
5 STATES -- AND THIS IS UNDER PARAGRAPH TWO, YOUR HONOR,
6 PARAGRAPH B -- THAT ADEQUATE INFORMATION SHOULD BE
7 DEVELOPED WITH RESPECT TO CHEMICAL SUBSTANCES, AND THAT
8 IT SHOULD BE THE RESPONSIBILITY OF THE MANUFACTURERS OF
9 CHEMICAL SUBSTANCES TO DEVELOP SUCH INFORMATION.

10 IN OTHER WORDS, CONGRESS DETERMINED THAT
11 AS BETWEEN THE AGENCY AND INDUSTRY, THE BURDEN OF
12 DEVELOPING INFORMATION SHOULD BE ALLOCATED UPON THOSE
13 WHO PROFIT FROM MANUFACTURING CHEMICAL SUBSTANCES.

14 CONSISTENT WITH THAT AND THE NEED FOR THE
15 AGENCY TO -- CONSISTENT WITH THE BURDEN ON INITIALLY TO
16 DEVELOP INFORMATION, CONSISTENT WITH THE IDEA THAT -- OF
17 COURSE THE INDUSTRY IS IN THE BEST POSITION TO BE AWARE
18 OF ITS USES OF CHEMICAL SUBSTANCES IN ITS PROCESSES.

19 THE COURT: ISN'T THE CENTRAL THEME OF
20 THE GOVERNMENT'S ARGUMENT HERE THAT IT DOES NOT MATTER
21 WHAT INHANCE KNEW OR DIDN'T KNOW?

22 MR. SELIGMAN: CORRECT. FOR THE PURPOSES
23 OF ITS LIABILITY, CORRECT. INHANCE SHOULD -- INHANCE
24 SHOULD HAVE BEEN AWARE, IT'S REASONABLE TO EXPECT A
25 COMPANY TO BE AWARE OF THE CHEMICALS IT IS USING. AND

1 SO THE ONUS IS ON THE COMPANY TO KNOW AND TO INFORM THE
2 AGENCY. THE ONUS IS NOT ON THE AGENCY TO BE AWARE OF
3 ALL ONGOING USES.

4 A CONTRARY RULE, YOUR HONOR --

5 THE COURT: IF WHETHER SOMETHING IS AN
6 ONGOING USE OR NOT DEPENDS ON WHETHER INFORMATION WAS
7 REASONABLY AVAILABLE, HOW AM I SUPPOSED TO DETERMINE
8 THAT AS A MATTER OF LAW?

9 MR. SELIGMAN: WELL, IF INHANCE WERE TO
10 LODGE THAT AS A CHALLENGE, WHICH I DON'T BELIEVE THEY
11 HAVE, THAT WOULD BE A PROCEDURAL CHALLENGE TO THE RULE
12 THAT THE AGENCY -- IF THE QUESTION IS DID THE AGENCY
13 HAVE INFORMATION --

14 THE COURT: IT'S A QUESTION OF SUMMARY
15 JUDGMENT. IT'S A QUESTION ABOUT SUMMARY JUDGMENT.

16 MR. SELIGMAN: WELL, I THINK THE
17 PRESUMPTION -- IF INHANCE IS ARGUING THAT THE RULE WAS
18 INVALID AS APPLIED TO IT BECAUSE IT HAD AN ONGOING USE,
19 THE BURDEN IS ON INHANCE AS A PROPONENT OF THE CLAIM
20 THAT THE REGULATION IS INVALID TO WIN ON PERSUASION ON
21 THAT AFFIRMATIVE DEFENSE.

22 THE COURT: BUT THE GOVERNMENT HAS MOVED
23 FOR SUMMARY JUDGMENT AND A GENERAL DISPUTE OF MATERIAL
24 FACT WOULD FORESTALL THE SUMMARY JUDGEMENT, CORRECT,
25 UNDER RULE 56?

1 MR. SELIGMAN: THAT'S CORRECT, YOUR
2 HONOR.

3 THE COURT: HOW DO I KNOW WHAT IS
4 REASONABLY AVAILABLE SITTING HERE AS A MATTER OF LAW?

5 MR. SELIGMAN: THE ADMINISTRATIVE RECORD
6 WAS COMPILED, AND AT THE TIME OF THE RULEMAKING, IT HAS
7 BEEN PUBLICLY AVAILABLE SINCE THE RULE WAS PROMULGATED
8 IN JULY OF 2020.

9 THE COURT: SO YOU ARE TELLING ME IF IT
10 DIDN'T MAKE IT INTO THE ADMINISTRATIVE RECORD, THAT AS A
11 MATTER OF LAW IT WAS NOT REASONABLY AVAILABLE?

12 MR. SELIGMAN: TO THE EXTENT -- IF THE
13 QUESTION IS DID THE AGENCY POSSESS OTHER INFORMATION,
14 THAT IS A -- I THINK THAT GOES TO A CLAIM THAT THERE WAS
15 SOME SORT OF DEFECT --

16 THE COURT: MY POINT IS, WHAT IF NO ONE
17 COULD HAVE POSSIBLY KNOWN THIS?

18 MR. SELIGMAN: I AM NOT SURE THAT NOBODY
19 POSSIBLY COULD HAVE KNOWN, GIVEN THE --

20 THE COURT: I DON'T EITHER. THAT WAS A
21 HYPOTHETICAL QUESTION. BUT IS THAT NOT A FACTUAL
22 DISPUTE?

23 MR. SELIGMAN: I BELIEVE THAT WOULD BE A
24 QUESTION OF FACT. I WOULD SAY --

25 THE COURT: SO I WOULD HAVE TO DENY

1 SUMMARY JUDGMENT ON THAT BASIS?

2 MR. SELIGMAN: WE HAVE ACCEPTED FOR THE
3 PURPOSES OF THIS -- FOR OUR MOTION IT DOES NOT MATTER
4 WHETHER THEY WERE AWARE OR NOT.

5 THE COURT: IT'S NOT NECESSARILY -- I AM
6 TRYING TO GET INTO YOUR VOCABULARY HERE. IT'S NOT ABOUT
7 AWARENESS, I GET THAT. BUT IT'S ABOUT WHAT IS
8 REASONABLY AVAILABLE, AND I THINK THAT'S PART OF YOUR
9 ARGUMENT, RIGHT?

10 MR. SELIGMAN: RIGHT. THE AGENCY RELIES
11 UPON ITS OWN KNOWLEDGE AND THE KNOWLEDGE THAT INDUSTRY
12 SUPPLIES, THAT IT FURNISHES IN THE FORM OF ITS COMMENTS
13 DURING THE COMMENTS AND RULEMAKING.

14 THE COURT: IF THERE WAS NO WAY FOR
15 INDUSTRY TO SUPPLY THIS INFORMATION, THEN DOES YOUR
16 ARGUMENT FALL APART?

17 MR. SELIGMAN: NO, YOUR HONOR, I DON'T
18 SEE THAT THERE IS A CARVE-OUT IN TSCA BASED ON AN
19 INDUSTRY'S IGNORANCE. I DON'T THINK A RULE THAT
20 INCENTIVIZES PUTTING -- A COMPANY PUTTING ITS HEAD IN
21 THE SAND AND NOT --

22 THE COURT: THAT WOULD BE WILLFUL
23 BLINDNESS; THAT'S A DIFFERENT STORY. I'M TALKING
24 ABOUT -- YOU KNOW, OBVIOUSLY, THAT'S AN ISSUE, SHOULD
25 HAVE KNOWN. IF WE ARE TALKING ABOUT SHOULD HAVE KNOWN,

1 GROSS NEGLIGENCE, WILLFUL BLINDNESS, ANY NUMBER OF
2 CONCEPTS, THAT IS ALL IN THE FACTS, RIGHT, WE ARE DEEP
3 IN THE FACTS NOW.

4 MR. SELIGMAN: IF INHANCE -- IF INHANCE
5 DOES NOT NEED TO INFORM THE AGENCY OF ITS ONGOING USE,
6 WHETHER IT WAS AWARE OR WHETHER IT WASN'T AWARE, THAT
7 WOULD DISINCENTIVIZE DEVELOPING AND SHARING INFORMATION,
8 WHICH AGAIN IS AT THE VERY CORE OF TSCA'S POLICY.

9 THE COURT: WHAT IF IT WAS IMPOSSIBLE FOR
10 INHANCE TO SHARE ITS ONGOING USE? I DON'T KNOW IF IT
11 WAS, BUT WHAT IF?

12 MR. SELIGMAN: IT WOULD NOT BE SUBJECT
13 TO -- IT WOULD NOT BE A USE -- THEIR USE WOULD NOT BE
14 EXEMPTED FROM THE RULE. IT WOULD NOT BE AN ONGOING USE,
15 AND THEREFORE, IT WOULD BE A USE THAT'S COVERED AND
16 SUBJECT TO FINAL RULE.

17 THE COURT: COULD IT BECOME AN ONGOING
18 USE?

19 MR. SELIGMAN: ONCE THE RULE IS FINAL,
20 THE RULE ANNOUNCES WHAT USES ARE ONGOING, AND THEY ARE
21 EXEMPTED FROM THE RULE, AND THAT IS THE END. OTHERWISE,
22 RULES ARE LEFT OPEN-ENDED AND THEY CAN ONLY BE SUBJECT
23 TO CARVING OUT FURTHER AND FURTHER EXEMPTIONS.

24 THE COURT: THE ADMINISTRATIVE PROCESS
25 THAT IS GOING ON RIGHT NOW IS ONE POTENTIAL RESULT OF

1 IT, THAT INHANCE'S FLUORINATION PROCESS COULD BE
2 DESIGNATED AS ONGOING USE AND ADDED TO THE RULE?

3 MR. SELIGMAN: NO, YOUR HONOR.

4 THE COURT: WHY NOT?

5 MR. SELIGMAN: THE REVIEW PROCESS FOR THE
6 SNUNS IS A -- IT'S ACTUALLY A RISK ASSESSMENT TO REVIEW
7 THE RISKS THAT CAN HELP WITH THE ENVIRONMENT. IT DOES
8 NOT DEAL WITH WHETHER A USE, ONGOING OR NOT, WAS DECIDED
9 DURING THE RULEMAKING PERIOD.

10 THE COURT: SO UNDER THE GOVERNMENT'S
11 INTERPRETATION OF THE LAW, IN A SITUATION WHERE NO ONE
12 IS -- IT IS IMPOSSIBLE TO KNOW, FOR WHATEVER REASON,
13 IT'S A HYPOTHETICAL. IT'S IMPOSSIBLE TO KNOW THAT YOU
14 WOULD BE COVERED BY AN SNU AND THAT POSSIBILITY IS ONLY
15 UNCOVERED AFTER THE FINALIZATION OF THE RULE, THEN THAT
16 USE IS FOREVER BARRED FROM BEING CONSIDERED AN ONGOING
17 USE; THAT'S THE GOVERNMENT'S POSITION?

18 MR. SELIGMAN: WHAT IS CLEAR FROM THE --
19 WELL, I WOULD SAY, YOUR HONOR, THAT THE USES THAT ARE
20 SUBJECT WERE ANNOUNCED IN THE PROPOSED RULEMAKING AND A
21 FINAL RULE. WHETHER ONE KNEW -- WHETHER AN ENTITY WAS
22 AWARE THEY WERE ENGAGED IN A USE IS A SEPARATE QUESTION.
23 AND IT'S ONE THAT -- THERE IS NO CARVE-OUT FOR I DIDN'T
24 KNOW OR I WAS NOT ABLE TO KNOW. YOU ARE CORRECT, YOUR
25 HONOR, IT IS OUR POSITION THAT WHETHER OR NOT INHANCE

1 WAS CAPABLE OF KNOWING IT IS -- WAS NOT -- BECAUSE IT
2 DID NOT INFORM THE AGENCY, ITS USE IS NOT EXEMPTED FROM
3 THE RULE.

4 THE COURT: DO YOU HAVE ANYTHING TO ADD
5 TO WHAT MR. GLADSTEIN SAID IN RESPONSE TO MY QUESTION
6 ABOUT WHY THIS IS BEING ADDRESSED THROUGH AN ENFORCEMENT
7 RATHER THAN -- THE MOMENT THE EPA FOUND OUT ABOUT THE
8 PRESENCE OF PFAS IN PESTICIDES, WHY NOT IMMEDIATELY SAY,
9 WOW, WE NEED A NEW REGULATION OR WE NEED TO AMEND THE
10 PREVIOUS REGULATION AND WE NEED TO HAVE FLUORINATION OF
11 SURFACES, OF HDPE SURFACES AS A SNU SO THAT WE CAN THEN
12 GO THROUGH THE REGULAR ADMINISTRATIVE PROCESS OF THIS?

13 WHY NOT DO THAT?

14 INSTEAD WHAT EPA DID IS THEY ISSUED AN
15 INTERPRETIVE LETTER, I GUESS, TO THE INDUSTRY AND
16 BROUGHT THIS LAWSUIT.

17 SO WHY?

18 MR. SELIGMAN: I THINK, CERTAINLY THE
19 AGENCY COULD HAVE AMENDED THE RULE, BUT THAT SORT OF
20 PROCESS WOULD AGAIN DISINCENTIVIZE SHARING OF
21 INFORMATION. AFTER THE FACT OF THE RULE AN ENTITY COULD
22 COME FORWARD AND SAY, ACTUALLY, WAIT A SECOND, WE WERE
23 ENGAGED IN AN ONGOING USE.

24 THE COURT: WELL, IF THEY KNEW ABOUT IT,
25 THAT'S GOING TO BE A PROBLEM FOR THEM, POTENTIALLY. I

1 MEAN, THE REAL ISSUE HERE IS IF THERE WAS NO WAY TO KNOW
2 ABOUT IT, THAT'S OUR SITUATION IN THIS ROOM, RIGHT?
3 ALLEGEDLY, I KNOW.

4 MR. SELIGMAN: RIGHT. I SUPPOSE THE EPA
5 COULD HAVE TAKEN THAT APPROACH, YOUR HONOR.

6 THE COURT: WHY DIDN'T THEY?

7 MR. SELIGMAN: BECAUSE THE CONCERN ABOUT
8 THE RISKS OF THE SIGNIFICANT NEW USE AND EXEMPTING IT
9 FROM THE RULE WOULD OBVIOUSLY PREVENT IT FROM BEING
10 REGULATED UNDER SECTION 5.

11 THE COURT: SO WHY NOT CONSIDER DOING
12 THAT? WHEN THE EPA PROPOSES ONE OF THESE SNU RULES, WHY
13 NOT IMMEDIATELY HIT EVERYBODY WITH ENFORCEMENT ACTIONS,
14 GET EVERYONE OFF THE MARKET, LET THE DUST SETTLE AND
15 FIGURE OUT WHAT IS SAFE AND WHAT IS NOT SAFE AFTER THAT?

16 MR. SELIGMAN: AT THE TIME THE RULE IS
17 PROPOSED, YOUR HONOR?

18 THE COURT: YES. YOU KNOW, PROPOSE THE
19 RULE, GET IT FINALIZED AND THEN START ENFORCING. WHY
20 BRING ALL OF THE ONGOING USERS IN? WHY DO THAT?

21 MR. SELIGMAN: BECAUSE THAT'S HOW THE
22 AGENCY INTERPRETS THE WORD "NEW" AS IT IS USED
23 SPECIFICALLY IN SECTION 5A OF THE STATUTE 2604(A).

24 THE COURT: SO NEW --

25 MR. SELIGMAN: SO ONGOING USE IS THE

1 OPPOSITE OF THE NEW USE, OR IS ONE THAT IS NOT NEW.

2 THE COURT: UNLESS YOU DIDN'T KNOW ABOUT
3 IT. IT'S LIKE SORT OF AN EXCEPTION. IT'S LIKE, NEW
4 MEANS NEW OR YOU DIDN'T KNOW ABOUT IT.

5 MR. SELIGMAN: AN ONGOING USE, YOUR
6 HONOR, IS ONE THAT -- I'M SORRY, A NEW USE IS ONE THAT
7 IS NEW TO THE AGENCY. SO REGARDLESS OF WHETHER -- AS A
8 FACTUAL MATTER, THE STATUTE DOES NOT READ -- AND IF IT
9 DID READ THIS WAY, INHANCE WOULD BE CORRECT, IF IT READ
10 A NEW USE IS ONE THAT THE ADMINISTRATOR DETERMINED -- A
11 DETERMINATION THAT A NEW USE IS ONE THAT IS SIGNIFICANT
12 AND SHALL BE MADE BY RULE. THAT WOULD ELIMINATE ANY
13 DISCRETION OR ANY AUTHORITY THE EPA WOULD HAVE TO
14 DETERMINE WHETHER A USE IS NEW, IT COULD JUST BE A
15 FACTUAL QUESTION, BUT THAT'S NOT WHAT THE STATUTE SAYS,
16 YOUR HONOR.

17 THE COURT: YES.

18 OTHER THAN THE FACT THAT INHANCE EITHER
19 DID NOT SPEAK UP OR WAS NOT ABLE TO SPEAK UP BECAUSE IT
20 DIDN'T KNOW, AS OF -- IN THAT 2015 TO 2020 WINDOW,
21 OTHERWISE, IS IT CONCEDED THAT INHANCE'S FLUORINATION
22 PROCESS IS AN ONGOING USE, JUST THE FACT THAT --

23 MR. SELIGMAN: WE WOULD CONCEDE THAT
24 INHANCE WAS ENGAGED IN A USE OF -- IN USES IN LONG-CHAIN
25 PFAS AS A RESULT OF FLUORINATION PREDATING THE USE OF

1 THE RULE AND THAT THAT USE CONTINUED DURING THE DURATION
2 OF THE RULING PERIOD.

3 THE COURT: SO THE ONLY REASON THE EPA
4 DOES NOT CONSIDER IT AN ONGOING USE IS BECAUSE IT WAS
5 NOT FLAGGED BY THE EPA BETWEEN 2015 AND 2020?

6 MR. SELIGMAN: WASN'T FLAGGED BY THE EPA,
7 THEREFORE IT WAS ABLE TO BE VERIFIED BASED ON THE
8 REASONABLY AVAILABLE INFORMATION TO THE AGENCY THAT THAT
9 USE WAS, IN FACT, ONGOING.

10 THE COURT: IT HAS TO BE VERIFIED BEFORE
11 THAT FINAL RULE HITS. IF IT'S NOT VERIFIED WHEN THE
12 FINAL RULE HITS, IT CAN'T BE ONGOING?

13 MR. SELIGMAN: IT WOULD NOT BE -- IT
14 WOULD BE NOT -- I WOULD NOT BE NEW TO THE AGENCY AT THE
15 POINT. THE AGENCY HAS TO VERIFY TO DETERMINE WHETHER,
16 IN FACT, IT IS A NEW OR NOT.

17 THE COURT: BUT ONCE THE FINAL RULE GOES,
18 NOBODY GETS TO COME BACK AND SAY, WAIT, YOU MISSED ME, I
19 AM AN ONGOING USE.

20 MR. SELIGMAN: LIKE ALL OF THE RULES,
21 YOUR HONOR, IT IS FINAL AT THE TIME IT IS PROMULGATED.

22 THE COURT: I GUESS THAT'S THE QUESTION
23 INHANCE IS RAISING. DOES EPA HAVE DISCRETION TO
24 PERMANENTLY BAR USES FROM HAVING ONGOING STATUS JUST
25 BECAUSE THEY MISSED THAT FINAL RULE WINDOW?

1 MR. SELIGMAN: AND OUR ANSWER, AGAIN, IS
2 WHEN THE STATUTE IS READ AS A WHOLE, THE ANSWER IS YES.

3 THE COURT: I GET IT. OKAY.

4 MR. SELIGMAN: YOUR HONOR, IF I MAY ADD
5 ONE POINT?

6 THE COURT: GO AHEAD.

7 MR. SELIGMAN: WITH RESPECT TO THE
8 MEANING OF THE WORD "NEW," THE WORD HAS TO BE READ IN
9 CONTEXT HERE. AND IN SECTION 2604(A) -- OR I SHOULD
10 BACK UP. I SHOULD SAY IN SECTION 2604 REFERS TO
11 SIGNIFICANT NEW USE RULES. IT ALSO -- OR SIGNIFICANT
12 NEW USES OF CHEMICAL SUBSTANCES AND NEW CHEMICAL
13 SUBSTANCES. THOSE TERMS, NEW CHEMICAL SUBSTANCE AND
14 SIGNIFICANT NEW USE RULE, BOTH APPEAR IN 2604(A). AND
15 TSCA DEFINES A NEW CHEMICAL SUBSTANCE, NOT ONE AS
16 FACTUALLY NEW, BUT RATHER ANY CHEMICAL THAT IS A NEW
17 CHEMICAL SUBSTANCE UNLESS AND UNTIL IT IS INCLUDE ON
18 TSCA'S INVENTORY, WHICH IS A LIST OF CHEMICAL SUBSTANCES
19 THAT THE AGENCY COMPILES AND PUBLISHES.

20 THE COURT: THAT'S FOR THE SUBSTANCE
21 PRONG. THE USE PRONG WAS DIFFERENT, RIGHT?

22 MR. SELIGMAN: THAT'S FOR NEW -- 2604(A)
23 GOVERNS MANUFACTURING OF NEW CHEMICAL SUBSTANCES AND --

24 THE COURT: THAT'S NOT AT ISSUE HERE,
25 RIGHT?

1 MR. SELIGMAN: CORRECT, YOUR HONOR. BUT
2 CONTEXTUALLY, THE STATUTE SHOULD, OF COURSE, BE READ IN
3 CONTEXT, AND THE WORD "NEW" IS USED WITH RESPECT TO NEW
4 CHEMICAL SUBSTANCES 2604(A) AND IT IS USED ALSO IN
5 2604(A) WITH RESPECT TO SIGNIFICANT NEW USES. IT'S
6 EVIDENT FROM THE WAY THAT TERM IS USED WITH RESPECT TO
7 NEW CHEMICAL SUBSTANCES THAT NEW DOES NOT MEAN
8 PREEXISTING, WHICH IS INHANCE'S ARGUMENT. IT IS INSTEAD
9 BASED ON INCLUSION IN THE INVENTORY WHICH IS BASED ON
10 EPA'S KNOWLEDGE OF THE NEW CHEMICAL SUBSTANCE.

11 LIKewise, A SIGNIFICANT NEW USE IS NOT
12 ONE THAT IS FACTUALLY PREEXISTING BUT ONE THAT THE
13 AGENCY IS ABLE TO DETERMINE IS NOT ONGOING AT THE TIME
14 OF THE RULEMAKING.

15 THE COURT: I GOT IT.

16 LET ME TALK TO MS. STETSON ABOUT THIS
17 ISSUE.

18 MR. SELIGMAN: THANK YOU, YOUR HONOR.

19 THE COURT: THANK YOU.

20 ALL RIGHT, MS. STETSON, LET'S FOCUS ON
21 THIS ISSUE OF SUBSTANTIAL NEW USE VERSUS THE OPPOSITE OF
22 THAT. AND THIS QUESTION OF KNOWLEDGE, WHICH -- THAT THE
23 LAST THING THAT MR. SELIGMAN SAID MADE A LOT OF SENSE TO
24 ME IN THAT -- RIGHT, ISN'T -- WHAT QUALIFIES AS NOT NEW,
25 THAT MUST ONLY BE BASED ON WHAT EPA KNOWS OR REASONABLY

1 COULD HAVE KNOWN.

2 SO HOW DO YOU UNPACK THAT FOR OUR CASE?

3 MS. STETSON: SO I THINK THERE'S A COUPLE
4 OF DIFFERENT WAYS TO UNPACK IT, YOUR HONOR. AND ONE OF
5 THE THINGS THAT I WOULD START WITH -- I THINK THERE'S
6 TWO MOVING PIECES HERE: ONE IS NEW, AND ONE IS USE.

7 YOU SPENT A LOT OF TIME TALKING WITH MR.
8 SELIGMAN ABOUT NEW, BUT I THINK USE HAS A SIGNIFICANT
9 ROLE TO PLAY HERE TOO.

10 BRIEFLY ON NEW, WHAT YOU HEARD MR.
11 SELIGMAN SAY WAS THAT -- AND I WROTE IT DOWN -- THAT
12 SOMETHING IS NEW IF IT WAS NEW TO THE AGENCY, IF IT WAS
13 NOT KNOWN TO THE AGENCY AT THE TIME OF THE RULEMAKING.
14 THAT'S THEIR DEFINITION OF NEW.

15 NEW MEANS NEW, AND A NEW USE IS A NEW
16 USE. SO THE AGENCY --

17 THE COURT: I ACTUALLY HAD NOT FOCUSED ON
18 THE SECTION OF THE STATUTE THAT TALKS ABOUT REASONABLY
19 AVAILABLE INFORMATION, SO HOW AM I SUPPOSED -- HOW DO
20 YOU WANT ME TO TAKE THAT INTO ACCOUNT?

21 MS. STETSON: THAT I THINK IS WHERE USE
22 COMES FROM. ONE OF THE THINGS THAT MR. SELIGMAN SAID
23 WAS THAT THE AGENCY -- OR INHANCE SHOULD HAVE BEEN AWARE
24 OF THE CHEMICALS IT'S USING. AND WHAT YOU DIDN'T HEAR
25 MR. SELIGMAN RESPOND TO IS MY POINT THAT I MADE EARLIER

1 ABOUT THE FINAL RULES, LIST OF USES, LIST OF PROPANOIC
2 ACID IN A SEALANT, LIST OF X IN Y. THOSE ARE USES OF
3 THESE PARTICULAR PFAS IN PARTICULAR MANUFACTURING
4 PROCESSES.

5 HE ALSO DID NOT RESPOND TO MY POINT ABOUT
6 APPENDIX PAGE 246 OF THE GOVERNMENT'S APPENDIX IN
7 SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY MOTION, WHICH
8 IS THE POINT THAT TALKS ABOUT ALL OF THE USES OF ALL OF
9 THE CHEMICALS THAT HAD BEEN SUBMITTED TO THE AGENCY OVER
10 THE PAST MONTH, EXCEPT FOR THE SIGNIFICANT NEW USE
11 NOTICES SUBMITTED BY INHANCE WHICH JUST SAY, NO FUNCTION
12 OR APPLICATION.

13 SO ONE WAY TO READ THIS IS THE WAY THAT
14 MR. SELIGMAN SAYS, WHICH IS SOME THINGS ARE SIGNIFICANT
15 NEW USE IF IT'S NOT KNOWN TO THE AGENCY. AND EVEN IF IT
16 IS NOT KNOWN TO THE REGULATED ENTITY, WHICH WE HAVE ALL
17 AGREED HERE WASN'T, EVEN IF IT'S NOT KNOWN TO THE
18 REGULATED ENTITY, IT'S STILL A NEW USE FOR OUR PURPOSES,
19 THEREFORE GOTCHA.

20 THE OTHER WAY TO READ THIS IS THAT THE
21 WORD "USE" DOES THE WORK HERE. SOMETHING IS A
22 SIGNIFICANT NEW USE IF IT IS USED BY A REGULATED ENTITY.
23 THE REASON THAT THIS CAN BE RESOLVED DURING THE
24 RULEMAKING PROCESS IN THE WAY THAT IT IS IS BECAUSE, AS
25 I MENTIONED EARLIER, A MANUFACTURER WHO IS USING PFAS IN

1 ITS PROCESSES KNOWS THAT IT IS USING PFAS IN ITS
2 PROCESSES.

3 SO I THINK ONE OF THE MAJOR PROBLEMS HERE
4 IS -- IN ADDITION TO THE TIMING ISSUE, WHAT WE ARE
5 TALKING ABOUT IS EPA TRYING TO FIT THIS IMPURITY
6 PRODUCED BY A FLUORINATION PROCESS THAT DOES NOT ITSELF
7 USE OR APPLY PFAS IN ANY SENSE, IT HAS NO FUNCTION OR
8 APPLICATION, AND TRYING TO MAKE THAT INTO A SIGNIFICANT
9 NEW USE WHEN IT'S NEITHER NEW NOR A USE. I WOULD AGREE
10 WITH MR. SELIGMAN, YOU HAVE TO READ THAT STATUTE IN
11 CONTEXT. THE WHOLE PHRASE IS, SIGNIFICANT NEW USE.

12 I WOULD ALSO SAY -- I'M SORRY.

13 THE COURT: YOU REALLY PUT MY HEAD IN A
14 PRETZEL WITH THIS ARGUMENT ABOUT NEW USE. SO THE
15 STATUTE, IN 2604(A)(1)(A), LITTLE ROMAN NUMERAL II.
16 THOSE TWO LITTLE ROMAN NUMERALS, THE FIRST ONE IS
17 MANUFACTURING OF CHEMICAL SUBSTANCE, WHICH WE ARE NOT
18 TALKING ABOUT.

19 THE SECOND LITTLE ROMAN NUMERAL II IS
20 MANUFACTURER OR PROCESS ANY CHEMICAL SUBSTANCE FOR A USE
21 WHICH BLAH, BLAH, BLAH, HAS BEEN DETERMINED AS
22 SIGNIFICANT NEW USE.

23 SO I DON'T THINK I CAN JUST FOCUS ON THE
24 THREE-WORD PHRASE, SIGNIFICANT NEW USE, BECAUSE THE
25 FORMATIVE -- WHEN THE PHRASE -- WHEN THE STATUTE CREATES

1 THE PHRASE, SIGNIFICANT NEW USE, THIS IS THE SUBSECTION
2 THAT GIVES BIRTH TO THAT PHRASE, RIGHT. IT SAYS,
3 MANUFACTURE OR PROCESS ANY CHEMICAL SUBSTANCE FOR A USE
4 WHICH THE ADMINISTRATOR HAS DETERMINED IN ACCORDANCE
5 WITH PARAGRAPH TWO IS A SIGNIFICANT NEW USE. AND WHEN
6 YOU LOOK AT PARAGRAPH TWO, IT SAYS, A DETERMINATION BY
7 THE ADMINISTRATOR THAT A USE OF A CHEMICAL SUBSTANCE IS
8 A NEW USE.

9 MY POINT HERE IS, IT'S NOT JUST THE
10 PHRASE, SIGNIFICANT NEW USE. IT'S MANUFACTURE OR
11 PROCESS THAT HAS BEEN DETERMINED TO BE A SIGNIFICANT NEW
12 USE. AND WHEN YOU LOOK AT THE DEFINITION OF THE WORD
13 PROCESS IN 2603, IT SAYS, THE TERM PROCESS MEANS THE
14 PREPARATION OF A CHEMICAL SUBSTANCE OR MIXTURE AFTER
15 IT'S MANUFACTURED FOR DISTRIBUTION IN COMMERCE... THE
16 OTHER STUFF IN THE STATUTE, BUT IT'S -- THE PROCESS IS
17 PREPARATION OF A CHEMICAL SUBSTANCE OR MIXTURE, RIGHT?

18 MS. STETSON: YES.

19 THE COURT: AND THAT'S WHY -- I THINK,
20 THAT'S WHY THE EPA THEN HAS SOME FURTHER DEFINITIONS IN
21 ITS REGULATIONS ABOUT THINGS LIKE BYPRODUCTS AND
22 IMPURITIES BECAUSE PLENTY OF THINGS ARE -- COULD BE A
23 SIGNIFICANT NEW USE IF YOU ARE JUST TALKING ABOUT
24 SOMETHING THAT IS GETTING MADE AS PART OF A PROCESS.

25 MS. STETSON: YES.

1 THE COURT: THAT'S POSSIBLE.

2 SO YOU ARE TELLING ME TO FOCUS ON
3 SIGNIFICANT NEW USE AND SAY, WELL, WHAT INHANCE IS DOING
4 WITH PFAS IS NOT REALLY A USE BECAUSE WE ARE NOT USING
5 THEM, THEY JUST SHOW UP. BUT I DON'T KNOW, THE STATUTE
6 IS A LITTLE BROADER THAN THAT, I THINK.

7 MS. STETSON: WELL, I THINK -- IF YOU ARE
8 FOCUSING ON PROCESS, I THINK WHAT I WOULD SAY IS -- AND
9 IF YOU GET BACK INTO THAT PAGE 45119 OF THE FINAL RULE
10 AND LOOK AT THOSE USES THAT ARE IDENTIFIED, SOME OF THEM
11 ARE MANUFACTURING CHEMICALS. THE COLLOQUY THAT YOU AND
12 I HAD EARLIER ABOUT DUPONT AND THE OTHER MANUFACTURERS
13 GETTING TOGETHER WITH EPA AND AGREEING NOT TO
14 MANUFACTURE CERTAIN CHEMICALS, THAT'S MANUFACTURING OF
15 PFAS.

16 USING A PFAS IN TERMS OF THE PROCESS
17 PRONG MEANS APPLYING OR ADDING THE PFAS TO A
18 PARTICULAR -- AS A SURFACTANT --

19 THE COURT: WHERE DID YOU GET THAT FROM?
20 WHAT YOU JUST SAID, WHERE IS THAT FROM?

21 MS. STETSON: I THINK IT'S A NATURAL
22 SPLIT BETWEEN MANUFACTURING AND PROCESSING.

23 THE COURT: BUT THE STATUTE HAS GOT A
24 DEFINITION.

25 MS. STETSON: RIGHT.

1 THE COURT: THE TERM "PROCESS" MEANS THE
2 PREPARATION OF A CHEMICAL SUBSTANTIAL OR MIXTURE.

3 MS. STETSON: RIGHT. RIGHT, AND I THINK
4 WHAT I WAS JUST DOING IS PUTTING IT INTO PRACTICAL
5 TERMS.

6 BUT IN ALL EVENTS, THE POINT THAT YOU
7 THEN MADE ABOUT IMPURITIES AND BYPRODUCTS. IF IT WERE
8 ENOUGH JUST TO SAY A USE IS ANYTHING THAT SHOWS UP
9 DURING THE MANUFACTURING OR PROCESSING PROCESS, THEN YOU
10 WOULD NOT HAVE THESE EXCEPTIONS FOR CERTAIN BYPRODUCTS
11 AND FOR IMPURITIES.

12 THE DEBATE THAT WE ARE HAVING WITH THE
13 GOVERNMENT ACTUALLY ABOUT BYPRODUCT VERSUS IMPURITY DOES
14 NOT HAVE TO DO WITH WHETHER THE CHEMICAL ITSELF IS BEING
15 USED. DESPITE WHAT MR. SELIGMAN SAID EARLIER, EVERYONE
16 AGREES, I THINK, THAT THIS PFAS IS NOT BEING USED IN ANY
17 SENSE UNDER THE STATUTE. THE ONLY QUESTION IS, IS IT
18 REGULABLE AS SOMETHING ELSE AS A BYPRODUCT. OUR POINT
19 IS THAT IT IS NOT REGULABLE AS A BYPRODUCT, BECAUSE IT
20 IS CLEARLY, AND EPA SAID MULTIPLE TIMES, IT'S AN
21 IMPURITY.

22 THE COURT: THAT'S NEXT.

23 MS. STETSON: SURE.

24 THE COURT: ON THE ISSUE OF SIGNIFICANT
25 NEW USE VERSUS ONGOING USE, IT SEEMS TO ME THAT BOTH

1 SIDES YOU ARE TAKING SOMEWHAT MAXIMALIST POSITIONS. THE
2 GOVERNMENT IS SAYING, WELL, IT DOESN'T MATTER WHETHER
3 THIS -- NO ONE HAD ANY IDEA ABOUT THIS. AS SOON AS IT
4 BECOMES REASONABLY AVAILABLE INFORMATION OR IT BECOMES
5 KNOWN OR WHATEVER, AS SOON AS IT COMES TO SOMEONE'S
6 ATTENTION, THEN IT'S A SIGNIFICANT NEW USE, AND IT HAS
7 LOST ITS ONGOING -- POTENTIAL TO HAVE ONGOING USE STATUS
8 FOREVER BECAUSE NOBODY KNEW ABOUT IT, OKAY.

9 INHANCE SEEMS TO BE SAYING ON THE FAR
10 OPPOSITE SIDE OF THE SPECTRUM, WELL, COMPANIES WOULD BE
11 PERFECTLY ENTITLED TO SIT TIGHT DURING THE PROPOSED
12 RULEMAKING PROCESS AND THEN LATER POP UP AND SAY -- OR
13 ONCE THEY GET CAUGHT TO SAY, WELL, IT'S AN ONGOING USE,
14 WE HAVE BEEN DOING THIS THE WHOLE TIME.

15 BOTH OF THOSE SEEM LIKE FAIRLY MAXIMALIST
16 POSITIONS. YOU ARE TELLING ME THERE IS NO MIDDLE
17 GROUND?

18 MS. STETSON: I THINK THAT ONE OF THOSE
19 POSITIONS IS NOT THE POSITION, WHICH IS WE ARE NOT
20 TAKING THAT POSITION. WE ARE NOT SAYING THAT INHANCE OR
21 ANY COMPANY THAT KNEW THAT IT WAS USING PFAS IN ITS
22 PROCESSES IN 2015 COULD HAVE COMFORTABLY SAT BACK AND
23 NOT REPORTED TO THE AGENCY THAT IT HAD AN ONGOING USE.
24 EVERYONE AGREES --

25 THE COURT: UNDER YOUR THEORY, WHY NOT?

1 IT'S AN ONGOING USE UNDER THE STATUTE. POOF, DONE.

2 MS. STETSON: I THINK TO YOUR POINT, IT
3 DEVOLVES VERY QUICKLY INTO A FACT QUESTION.

4 FURTHER ON THAT, I THINK THAT IF A
5 COMPANY WERE TO BE USING PFAS IN ITS PROCESSES AND NOT
6 COME FORWARD, I THINK AT THAT POINT THE AGENCY WOULD
7 HAVE CAUSE TO SAY, TO ASK THE QUESTIONS THAT YOU ARE
8 ASKING: WHEN DID YOU KNOW THIS; COULD YOU HAVE
9 REASONABLY HAVE KNOWN THIS; WERE YOU NEGLIGENT IN NOT
10 KNOWING THIS OR WILLFULLY BLIND IN NOT KNOWING THIS?

11 AND IN THOSE CIRCUMSTANCES, MAYBE THE
12 AGENCY COULD START AN ENFORCEMENT PROCESS AND FIGURE OUT
13 WHAT THE COMPANY'S KNOWLEDGE AND INTENTIONS WERE AT THE
14 TIME.

15 BUT HERE, YOU DON'T NEED TO TAKE OR REACH
16 THAT MAXIMALIST POSITION IN ORDER TO AGREE WITH US THAT
17 WHERE A COMPANY DID NOT KNOW THAT IT WAS PRODUCING PFAS
18 AS AN IMPURITY IN A FLUORINATION PROCESS THAT DOES
19 ITSELF NOT USE PFAS IN ANY FUNCTION OR APPLICATION, AS
20 THE AGENCY AGREES, THAT IN THOSE CIRCUMSTANCES, THAT IF
21 WE ARE GOING TO TALK ABOUT THIS AS AN ONGOING USE VERSUS
22 A NEW USE, THAT IS PLAINLY AN ONGOING USE. THE USE HAS
23 BEEN ONGOING SINCE THE EARLY 1980.

24 AND THE ONLY WAY THAT THE GOVERNMENT CAN
25 PRETZEL ITSELF OUT OF THAT IS TO SAY THAT BECAUSE THE

1 GOVERNMENT DIDN'T KNOW AT THE TIME OF THE AGENCY
2 RULEMAKING THAT THERE MIGHT HAVE BEEN A THING THAT WAS
3 PRODUCED DURING THE PROCESS OF FLUORINATION THAT LED TO
4 A DIFFERENT KIND OF PFAS, THEREFORE IT'S A SIGNIFICANT
5 NEW USE NOW. THAT'S COMPLETELY BACKWARDS.

6 THERE IS A MAXIM THAT YOU HEAR ALL THE
7 TIME IN THE LAW, NO STATUTE PURSUES ITS PURPOSES AT ALL
8 COSTS, RIGHT? SO WHAT YOU HEARD MR. SELIGMAN SAY WHEN
9 HE READ TO YOU FROM THE PURPOSE OF THE STATUTE, THAT IS
10 THE STATUTORY PURPOSE.

11 BUT HERE WHERE YOU HAVE A REGULATED
12 ENTITY THAT IS CAUGHT IN THIS RIDICULOUS CATCH-22 WHICH
13 COULD HAVE, IF IT HAD BEEN TOLD, THIS IS HOW WE ARE
14 INTERPRETING THE STATUTE, THIS IS HOW WE ARE
15 INTERPRETING THE REGULATIONS, YOU NEED TO GO OUT AND
16 TEST YOUR PRODUCTS AND SPEAK NOW OR FOREVER, HOLD YOUR
17 PEACE -- YOU HEARD NO RESPONSE TO THAT, BY THE WAY -- OR
18 YOU ARE GOING TO BE TAGGED WITH HAVING A SIGNATURE NEW
19 USE EVEN IF YOU HAVE BEEN DOING THIS SINCE THE 1980S,
20 THEN THE GOVERNMENT MIGHT HAVE A POINT.

21 BUT HERE, THIS IS CLEARLY AN ONGOING USE
22 TO THE EXTENT IT IS, AGAIN, A USE AT ALL.

23 THE COURT: OKAY. LET ME HEAR FROM MR.
24 SELIGMAN.

25 WE ARE GOING TO TALK ABOUT IMPURITIES AND

1 BYPRODUCTS .

2 MR. SELIGMAN: THANK YOU, YOUR HONOR. IF
3 I MAY APPROACH. WE HAVE A BINDER WITH THE STATUTES AND
4 REGULATIONS.

5 THE COURT: THIS IS IMPRESSIVE PAPERWORK.
6 I THINK I LIKE THE -- IT'S A LITTLE BIT -- I FEEL LIKE
7 YOU ARE -- IT'S LIKE YOU ARE THINKING THAT I HAVE NOT
8 LOOKED AT THESE BEFORE.

9 MR. SELIGMAN: IF I MAY ADDRESS A COUPLE
10 OF THE POINTS THAT MS. STETSON MADE?

11 THE COURT: BRIEFLY, YES.

12 MR. SELIGMAN: IF I UNDERSTOOD IN ITS
13 BRIEFING, INHANCE TOOK THE POSITION THAT "NEW" MEANS NOT
14 PREVIOUSLY NOT EXISTING.

15 THE COURT: YES, I AGREE WITH YOU. I
16 THINK THAT WAS THEIR POSITION.

17 MR. SELIGMAN: RIGHT. UNLESS THEY HAVE
18 CHANGED THEIR POSITION IN COURSE OF THIS HEARING, ARE
19 YOU MAKING NOW YOUR ARGUMENT THAT "NEW" MEANS AN ONGOING
20 USE THAT -- OR RATHER ANY USE IS EXEMPT IF IT WAS
21 ONGOING REGARDLESS OF WHETHER THE COMPANY HAD KNOWLEDGE,
22 THAT WOULD MAKE TSCA, WHICH IS A STRICT LIABILITY
23 STATUTE, IT WOULD TURN IT INTO A QUESTION -- A FACT
24 QUESTION OF AN ENTITY'S KNOWLEDGE IN THE ENFORCEMENT
25 ACTION.

1 THE COURT: WELL, THE STATUTE -- AS YOU
2 POINTED OUT TO ME, THE STATUTE TALKS A LOT ABOUT WHAT IS
3 REASONABLY AVAILABLE INFORMATION. IF WHAT IS AND IS NOT
4 REASONABLY AVAILABLE IS NOT A FACT QUESTION, I DON'T
5 KNOW WHAT IT IS.

6 LET'S TALK ABOUT THE IMPURITY AND
7 BYPRODUCT STUFF. THE CONCEPT OF IMPURITY AND BYPRODUCT,
8 THIS IS A CREATURE ENTIRELY OF REGULATION; IS THAT
9 RIGHT? IT'S NOT UNDER THE STATUTE?

10 MR. SELIGMAN: THAT'S CORRECT, YOUR
11 HONOR.

12 THE COURT: OKAY. AND THE KEY FOCUS --
13 OR THERE IS DEFINITIONAL STUFF IN 720. BUT IN 721, I
14 KIND OF THINK THE STARTING PLACE IS AT 21.45 WHICH
15 IDENTIFIES THESE EXCEPTIONS. IS THAT A GOOD PLACE TO
16 START?

17 MR. SELIGMAN: YES, YOUR HONOR.

18 THE COURT: IT SAYS, THERE IS AN
19 EXEMPTION IN 721.45, THE PERSON MANUFACTURES OR
20 PROCESSES THE SUBSTANCE ONLY AS AN IMPURITY.

21 AND THEN FOR A DEFINITION, I'M SUPPOSED
22 TO LOOK AT 720. I THINK EVERYONE AGREES ON THAT, RIGHT?

23 MR. SELIGMAN: THAT'S CORRECT, YOUR
24 HONOR.

25 THE COURT: AND 720 SAYS, IMPURITY MEANS

1 A CHEMICAL SUBSTANCE WHICH IS UNINTENTIONALLY PRESENT
2 WITH ANOTHER CHEMICAL SUBSTANCE.

3 NOW, WE HAVE GOT SUMMARY JUDGMENT ISSUES
4 HERE POTENTIALLY, BUT LET'S JUST HAVE THE DISCUSSION.
5 PLEASE JUST ASSUME WITH ME THAT THE PFAS IN -- THE
6 PROCESS WAS UNINTENTIONALLY PRESENT WITH ANOTHER
7 CHEMICAL SUBSTANCE. LET'S ASSUME FACTUALLY THAT THAT IS
8 TRUE. I DON'T KNOW IF IT'S TRUE, BUT LET'S ASSUME IT'S
9 TRUE. THEREFORE, THE PFAS IS PRESENT AS AN IMPURITY.
10 AND SO HOW DOES THE GOVERNMENT DERAIL THAT ARGUMENT?

11 MR. SELIGMAN: THAT ARGUMENT, YOUR HONOR,
12 READS OUT THE WORD "ONLY" IN THE EXCEPTION PORTION.

13 THE COURT: GOOD. OKAY, SO IT SAYS, ONLY
14 AS AN IMPURITY. AND IF I UNDERSTAND IT, THEN THE
15 GOVERNMENT'S ARGUMENT IS, WELL, IT COULD BE AN IMPURITY
16 AND A BYPRODUCT.

17 MR. SELIGMAN: THAT'S POSSIBLE AT THE
18 TIME OF MANUFACTURE.

19 THE COURT: OKAY.

20 MR. SELIGMAN: INHANCE MANUFACTURED OR
21 PRODUCES LONG-CHAIN PFAS AS A BYPRODUCT. SUBSEQUENT TO
22 THE MANUFACTURE, THE LONG-CHAIN PFAS WHICH REMAINED WITH
23 THE PARTIALLY FORMED POLYETHYLENE COULD BE CONCEIVED OF
24 AS AN IMPURITY.

25 THE COURT: OKAY. AND THAT ARGUMENT

1 IS -- AND JUST TO PRESENT AN ALTERNATIVE TO THAT, WHEN
2 IT SAYS, THE PERSON MANUFACTURES OR PROCESSES THE
3 SUBSTANCE ONLY AS AN IMPURITY, IF I TAKE THE DEFINITION
4 OF IMPURITY AND KIND OF PUT IT IN THERE, THEN IT SAYS,
5 THE PERSON MANUFACTURES OR PROCESSES THE SUBSTANCE ONLY
6 AS A CHEMICAL SUBSTANCE WHICH IS UNINTENTIONALLY PRESENT
7 WITH ANOTHER CHEMICAL SUBSTANCE. IF I MAKE THAT OUT OF
8 THE TWO PARTS, IT SEEMS TO ME THE LOGICAL WORK -- THE
9 WORD "ONLY" IS DOING THERE IS SAYING THAT THAT CHEMICAL
10 IS ONE THAT IS ONLY -- TO ME, THE SENSIBLE WAY TO READ
11 IT IS THAT IT ONLY APPLIES TO UNINTENTIONALLY. OKAY,
12 "ONLY UNINTENTIONALLY PRESENT," NOT ALSO "INTENTIONALLY
13 PRESENT."

14 SO THE WORD "ONLY" IN 721.45(E) I THINK
15 IS ACTING ON THE WORD "UNINTENTIONALLY." I THINK THAT'S
16 THE MOST LOGICAL WAY TO READ THE STATUTE. NOT THE
17 STATUTE, THE RULE.

18 WHAT IS YOUR TAKE ON THAT?

19 MR. SELIGMAN: I WOULD DISAGREE, YOUR
20 HONOR. IF YOU COMPARE THE EXCEPTIONS IN 721, WHICH
21 COVERS -- WHICH ARE THE RULES PROMULGATED -- OR THE
22 RULES IMPLEMENTING SECTION 5 OF THE STATUTE,
23 SPECIFICALLY WITH RESPECT TO SIGNIFICANT NEW USES, WITH
24 THE EXCEPTIONS IN PART 720, WHICH ARE THE EXEMPTIONS FOR
25 NEW CHEMICAL SUBSTANCES, THE EXCEPTIONS IN 720 ARE

1 SIGNIFICANTLY BROADER, PARTICULARLY WITH RESPECT TO
2 IMPURITIES. WHEREAS THE EXCEPTION IN PART 721.45, HERE
3 THEY ARE REFERENCING -- REFERS TO ONLY IMPURITIES. THE
4 EXCEPTION PART 720 FOR IMPURITIES GO --

5 THE COURT: 720, EXCEPTION H?

6 MR. SELIGMAN: YES, YOUR HONOR. THAT
7 REFERS TO ANY IMPURITY, THAT IS, THE SUBSTANCE COULD BE
8 AN IMPURITY AND A BYPRODUCT, ANY TYPE OF IMPURITY.

9 WHEN THE SUBSTANCE EXISTS ONLY AS AN
10 IMPURITY, AND WE ARE IN PART 721, BECAUSE THOSE ARE THE
11 EXCEPTIONS THAT APPLY --

12 THE COURT: YES, I MEAN THE WHOLE
13 SENTENCE IS -- IF YOU PIECE TOGETHER THE ENTIRE SENTENCE
14 OF 720 AND YOU COMPARE IT TO 721, THE ENTIRE SENTENCE OF
15 720.30 IS THE FOLLOWING SUBSTANCES ARE NOT SUBJECT TO
16 THE NOTIFICATION REQUIREMENTS UNDER OF THIS PART...THE
17 CHEMICAL SUBSTANCES DESCRIBED BELOW...ANY IMPURITY.

18 IN 721.45 IT'S "THE PERSONS," RIGHT? IT
19 STARTS OUT WITH "THE PERSONS," RIGHT? AND THEN YOU
20 GET -- IT'S TALKING ABOUT THE PERSON MANUFACTURES OR
21 PROCESSES THE SUBSTANCE ONLY AS AN IMPURITY. SO YOU
22 HAVE GOT THE VERB "PROCESSES" IN THERE, WHICH IS
23 NECESSARY BECAUSE WE ARE TALKING ABOUT WHAT PERSONS ARE
24 OR AREN'T DOING. SO IT'S A DIFFERENT SETUP. I DON'T
25 KNOW IF THEY MIX AND MATCH AND YOU MIX IT AND MATCH IT

1 LIKE YOU WANT IT TO.

2 MR. SELIGMAN: I THINK YOU NEEDED THAT --
3 IT'S THE KEY THAT THE WORD THAT EPA KNEW HOW -- THEY
4 KNEW HOW TO WRITE A REGULATION THAT BROADLY COVERS AN
5 IMPURITY, WHETHER IT EXISTS BY ITSELF OR WITH OTHER --
6 OR COULD ALSO BE CONSIDERED -- OR FALL UNDER OTHER
7 CATEGORIES LIKE BYPRODUCT, THAT WOULD BE ANY IMPURITY.
8 AND THE AGENCY KNOWS HOW TO WRITE A MORE LIMITED RULE.
9 AND THAT'S WHAT IT DID WITH THE NARROWER EXCEPTIONS IN
10 721.45.

11 THE COURT: IN YOUR READING OF 721.45(D),
12 WHAT IS AN EXAMPLE OF SOMETHING THAT WOULD QUALIFY AS AN
13 IMPURITY FOR THE EXCEPTION, BUT THEN NOT, NOT BE BOOTED
14 BACK OUT OF THE EXCEPTION BY VIRTUE OF BEING A
15 BYPRODUCT?

16 MR. SELIGMAN: YOUR HONOR, IF I MAY
17 RETURN TO MY TABLE TO GET THE GRAPH.

18 THE COURT: THE NATURE OF MY QUESTION IS,
19 ARE YOU READING 721.45(E) OUT OF THE RULE BY VIRTUE OF
20 YOUR CRAMPED READING OF THE RULE?

21 MR. SELIGMAN: YOUR HONOR, YOU ASKED FOR
22 AN EXAMPLE OF WHEN A CHEMICAL SUBSTANCE CAN EXIST ONLY
23 AS AN IMPURITY?

24 THE COURT: YES. GIVE ME AN EXAMPLE OF
25 SOMETHING THAT FITS D, ONLY IF AN IMPURITY -- AN

1 IMPURITY THAT IS COVERED BY D THAT IS NOT THEN UNCOVERED
2 BY VIRTUE OF ALSO BEING A BYPRODUCT.

3 MR. SELIGMAN: NONREACTING STARTING
4 MATERIAL. AND ANOTHER EXAMPLE, YOUR HONOR, WOULD BE A
5 CONTAMINANT SUCH AS LEAD IN DRINKING WATER BEFORE THE
6 LEAD IS REMOVED. THERE IS NO BYPRODUCT PRODUCED.

7 THE COURT: IN OTHER WORDS, YOU ARE
8 TALKING ABOUT YOU BUY -- THIS COULD WORK, RIGHT. YOU
9 BUY A STARTING MATERIAL. IT COMES WITH THE IMPURITY IN
10 IT. SO THAT -- SO UNDER 721.45, YOU ARE SAYING THAT
11 WOULD BE AN IMPURITY UNDER D. BUT IT WOULD NOT ALSO BE
12 A -- IT WOULD NOT GET BOOTED OUT BY VIRTUE OF BEING A
13 BYPRODUCT?

14 MR. SELIGMAN: THAT'S CORRECT, YOUR
15 HONOR.

16 THE COURT: OKAY. I GET IT.

17 MR. GLADSTEIN: CONVERSELY HERE, OF
18 COURSE, WE HAVE A BYPRODUCT, WHICH -- AFTER IT WAS
19 MANUFACTURED COULD BE DEEMED BY INHANCE OR TO DOWNSTREAM
20 USERS AS AN IMPURITY, BOTH A BYPRODUCT AND IMPURITY.

21 THE COURT: DO YOU HAVE ANYTHING ELSE TO
22 ADD TO THE BYPRODUCT AND IMPURITY ARGUMENT OR CAN I HEAR
23 FROM MS. STETSON?

24 MR. SELIGMAN: THAT'S ALL, YOUR HONOR.
25 THANK YOU.

1 THE COURT: WHAT'S GOING ON OVER THERE?

2 WHAT'S GOING ON OVER THERE?

3 MR. SUSSMAN: HE NEEDS TO PUT MONEY IN
4 THE PARKING METER, AND THEN HE IS GOING TO BE COMING
5 BACK.

6 THE COURT: OKAY. BYPRODUCT AND
7 IMPURITY, THE ARGUMENT FROM THE GOVERNMENT IS THAT IT'S
8 APPROPRIATE AND ACTUALLY THE BETTER READING OF 721.45(D)
9 FOR THE WORD "ONLY" TO BE CONTRASTING WITH BYPRODUCTS
10 RATHER THAN TO BE CONTRASTING WITH SUBSTANCES THAT ARE
11 NOT UNINTENTIONALLY PRESENT.

12 WHAT DO YOU THINK?

13 MS. STETSON: I THINK THAT DEPENDS FIRST
14 OF ALL ON THE IDEA THAT SOMETHING CAN BOTH BE A
15 BYPRODUCT AND AN IMPURITY. I THINK THAT'S POSSIBLE IN
16 THEORY. I THINK IN PRACTICE WHAT WE ARE TALKING ABOUT
17 HERE IS SOMETHING THAT IS FURTHER ELUCIDATED BY A
18 DIFFERENT DEFINITION. IF YOU LOOK AT 40 CFR 720.3(R),
19 WHICH IS MANUFACTURE FOR COMMERCIAL PURPOSES, THIS SHEDS
20 LIGHT MORE THAN THE INDIVIDUAL DEFINITIONS ON WHAT
21 CONSTITUTES A BYPRODUCT AND WHAT CONSTITUTES AN
22 IMPURITY.

23 AND I DO WANT TO OBSERVE --

24 THE COURT: WALK ME THROUGH THAT.

25 MS. STETSON: SURE. 730.3(R)(2), THE

1 TERM ALSO APPLIES TO SUBSTANCES THAT ARE PRODUCED
2 COINCIDENTALLY -- DO YOU SEE THAT --

3 HE COURT: YES.

4 MS. STETSON: -- DURING MANUFACTURE,
5 PROCESSING, OR THE USE, INCLUDING BYPRODUCTS THAT ARE
6 SEPARATED FROM THAT OTHER SUBSTANCE OR MIXTURE, AND
7 IMPURITIES THAT REMAIN IN THAT SUBSTANCE OR MIXTURE.
8 THAT'S THE DIFFERENCE. BOTH CAN BE INTENTIONAL --
9 UNINTENTIONALLY PRODUCED DURING THE PROCESS, BUT THIS IS
10 THE ONLY THING THAT TELLS YOU WHAT THE DIFFERENCE IS
11 BETWEEN A BYPRODUCT AND AN IMPURITY.

12 THE COURT: WELL, AN IMPURITY, I THINK
13 WHAT MR. SELIGMAN WOULD SAY IS SOMETIMES AN IMPURITY
14 MIGHT BE A BYPRODUCT, BUT IT MIGHT ALSO BE, TO USE HIS
15 EXAMPLE, A REACTING CONTAMINANT TO REACTANTS.

16 MS. STETSON: SO I WAS INTERESTED TO HEAR
17 MR. SELIGMAN SAY THAT AN IMPURITY IS A CONTAMINANT.

18 THE COURT: I DON'T KNOW THAT HE ACTUALLY
19 USED THAT WORD.

20 MS. STETSON: HE DID.

21 THE COURT: THE EXAMPLE WAS, YOU HAVE A
22 STARTING MATERIAL AND THEN THE IMPURITY COMES IN WITH
23 THE STARTING MATERIAL.

24 MS. STETSON: RIGHT, RIGHT.

25 SO WHAT THE EPA HAS SAID ON THIS ISSUE UP

1 UNTIL ITS NOTICE OF VIOLATION TO INHANCE HAS BEEN
2 REMARKABLY CONSISTENT. IT HAS ALWAYS CALLED PFAS
3 IMPURITIES, FOR WHAT WE CAN TELL, INCLUDING IN THE MARCH
4 LETTER TO INDUSTRY THAT CAME OUT A COUPLE OF WEEKS AFTER
5 INHANCE GOT ITS NOTICE OF VIOLATION, THE FIRST PARAGRAPH
6 TALKS PFAS AS A CONTAMINANT.

7 THE OTHER THING I POINT YOU TO IN YOUR
8 BRIEFING BOOK -- AND I KNOW YOU HAVE READ EVERYTHING,
9 BUT WE WERE TRYING TO CONSOLIDATE THE REAMS FOR YOU.

10 TAB FOUR OF THE BRIEFING BOOK, WHICH IS
11 OTHER EPA MATERIALS, CONTAINS THREE EXHIBITS THAT WERE
12 SUBMITTED BY VARIOUS PARTIES DURING THE COURSE OF THE
13 BRIEFING HERE. IF YOU LOOK AT THAT FIRST EXHIBIT, WHICH
14 IS PEERS EXHIBIT 23, AND YOU TURN TO PAGE 702 AND YOU
15 LOOK AT QUESTION FOUR, WHAT SHOULD PESTICIDE REGISTRANTS
16 DO IF THEY FIND PFAS IN THEIR PRODUCTION LINES?

17 AND YOU READ FOUR LINES DOWN, REGISTRANTS
18 SHOULD REPORT TO EPA ADDITIONAL INFORMATION ON
19 IMPURITIES SUCH AS PFAS.

20 EXHIBIT 30, SAME THING. AND THIS IS PAGE
21 772 OF THE APPENDIX, BUT IT'S JUST YOUR NEXT FEW PAGES
22 OF YOUR BRIEFING BOOK.

23 THE COURT: I THINK MR. SELIGMAN WOULD
24 SAY THOSE ARE IMPURITIES WITH RESPECT TO PESTICIDE
25 REGISTRANTS, BUT NOT WITH RESPECT TO INHANCE.

1 MS. STETSON: SO THEY ARE IMPURITIES WITH
2 RESPECT TO FIFRA BUT NOT FOR WHAT WOULD BE --

3 THE COURT: BECAUSE THE DEFINITION OF THE
4 WORD "IMPURITY" HAS SOMETHING TO DO WITH WHERE THEY COME
5 FROM.

6 MS. STETSON: SO IF MR. SELIGMAN INTENDS
7 TO TAKE THAT POSITION, THAT'S FASCINATING, AND I WILL BE
8 PREPARED TO REBUT IT. BECAUSE THEN SOMETHING IS AN
9 IMPURITY FOR ONE EPA ADMINISTERED PROGRAM BUT A
10 BYPRODUCT FOR ANOTHER? HERE YOU HAVE AN IMPURITY THAT
11 IS IDENTIFIED AS PFAS IN THE VERY THING THAT WE ARE
12 TALKING ABOUT HAVING HAD THE PFAS IN IT, WHICH HAS LED
13 TO THIS PARTICULAR ACTION.

14 SO ON PAGE 772 AGAIN, IMPURITIES SUCH AS
15 PFAS, THE LAST ITEM IN THAT PARTICULAR BRIEFING BOOK IS
16 AN EPA Q&A ABOUT WHAT CONSTITUTES A BYPRODUCT WHICH IS
17 AN IMPURITY. AND IF YOU TURN TO PAGE EIGHT OF THAT Q&A,
18 YOU FIND THIS QUESTION:

19 CHEMICAL SUBSTANCE X IS FORMED
20 UNINTENTIONALLY WITHOUT A NEW SEPARATE COMMERCIAL
21 PURPOSE DURING THE MANUFACTURE OF ANOTHER CHEMICAL
22 SUBSTANCE Y. FURTHERMORE, IT IS NOT ISOLATED FROM
23 SUBSTANCE Y. WOULD IT BE ACCURATE TO DESCRIBE SUBSTANCE
24 X AS AN IMPURITY?

25 ANSWER SIX, YES. CHEMICAL SUBSTANCE X IS

1 BOTH A BYPRODUCT AND AN IMPURITY. THE UNINTENTIONAL
2 BYPRODUCT THAT REMAINS WITH THE INTENDED PRODUCT, I.E.,
3 IS NOT ISOLATED FROM THAT PRODUCT, IS AN IMPURITY. THAT
4 WAS THE POINT THAT WE MADE IN OUR SURREPLY AT SIX.

5 THE LAST THING I WILL SAY ABOUT EPA'S
6 COMMENTS HERE, AND THIS GOES BACK TO KNOWLEDGE AS WELL,
7 IS IN THE FINAL RULE, THERE IS A QUESTION THAT WAS POSED
8 BY ONE COMMENTER. AND THIS IS AT PAGE 45,116 OF THE
9 FINAL RULE. THE COMMENTER TALKS ABOUT FLUORINATED
10 SUBSTANCES THAT DO NOT FALL INTO THE SCOPE OF THE
11 SIGNIFICANT NEW USE RULE THAT MAY DEGRADE INTO
12 LONG-CHAIN PFAS SUBSTANCES. ONE COMMENTER, AND I AM
13 QUOTING NOW, STATED THAT THEIR IMPORTED ARTICLE
14 CONTAINED RESIDUAL LONG-CHAIN LCPFAC FROM THE USE OF A
15 PARTICULAR FLUOROALKYL PRODUCTION OUTSIDE THE U.S.

16 THE RESPONSE BY EPA ON THAT PAGE WAS, TO
17 THE EXTENT THE CHEMICAL SUBSTANCE SUBJECT TO THE SNUR IS
18 ONLY "UNINTENTIONALLY PRESENT" AT THE POINT OF FOREIGN
19 MANUFACTURE, IT IS ALREADY EXEMPT FROM REPORTING BY THE
20 IMPORTER AS AN IMPORTED IMPURITY...ADDITIONALLY, THE
21 IMPURITY EXEMPTION INCLUDES DOMESTIC MANUFACTURE AND
22 PROCESSING.

23 SO IF YOU ARE A FLUORINATOR AND YOU ARE
24 LOOKING AT THAT FINAL RULE, YOU UNDERSTAND ONE THING,
25 WHICH IS THE ONE MENTION OF FLUORINATION IN THIS FINAL

1 RULE IS IN THAT COMMENT. AND THE COMMENT SAYS, DON'T
2 WORRY, UNINTENTIONAL MANUFACTURE OF PFAS IS AN IMPURITY.

3 AN IMPURITY IS ALSO WHAT IT SAID IN
4 EXHIBIT 23 OF THE PEERS MOTION, EXHIBIT 30 OF THE PEERS
5 MOTION, AND IN THE Q&A ITSELF.

6 THE COURT: YOU DIDN'T CROSS-MOVE ON THIS
7 ISSUE OR ON THE ARTICLE ISSUE, YOU WANT DISCOVERY ON
8 THOSE ISSUES, RIGHT?

9 MS. STETSON: WE DO. I THINK WE WANT
10 DISCOVERY ON A NUMBER OF ISSUES, NOT LEAST ON THE
11 KNOWLEDGE ISSUE THAT YOU AND I HAD THE EARLIER COLLOQUY
12 ABOUT.

13 THE COURT: YOU MOVED TO DISMISS ON,
14 RIGHT -- WASN'T NEW VERSUS OLD IN THE MOTION TO DISMISS?

15 MS. STETSON: NEW VERSUS OLD WAS IN THE
16 MOTION TO DISMISS, YES.

17 THE COURT: SO YOU THINK I CAN DECIDE
18 THAT AS A MATTER OF LAW?

19 MS. STETSON: I DO, YES.

20 THE COURT: MR. SELIGMAN, DO YOU HAVE
21 FINAL THOUGHTS ON IMPURITY VERSUS BYPRODUCT?

22 MR. SELIGMAN: BRIEFLY, YOUR HONOR.

23 THE COURT: OKAY. LET ME JUST HEAR FROM
24 HIM.

25 MR. SELIGMAN: I THINK AS YOUR HONOR IS

1 AWARE, MS. STETSON IS QUOTING A DIFFERENT STATUTE, WHICH
2 I AM NOT SURE THE DEFINITION FIT FOR EITHER BYPRODUCT OR
3 IMPURITY. BUT IT'S A DIFFERENT SECTION, IT'S A
4 DIFFERENT CONTEXT.

5 IN YOUR PACKET, YOUR HONOR, WE INCLUDED
6 THE ACTUAL GUIDANCE THAT INHANCE JUST REFERENCED, A
7 DRAFT GUIDANCE FROM THE EPA THAT WAS PUBLISHED IN 2010.
8 AND THAT'S IN THEIR BRIEFING, EXHIBIT 1 TO THEIR
9 SURREPLY IN YOUR BOOK. WE HAVE INCLUDED THE ACTUAL
10 GUIDANCE, WHICH IS VERBATIM WHAT THE GUIDANCE SAYS. AND
11 THE Q&A DESCRIBES PRECISELY THE SITUATION, CHEMICAL
12 SUBSTANCE X IS FORMED UNINTENTIONALLY WITHOUT ANY
13 SEPARATE COMMERCIAL PURPOSE DURING THE MANUFACTURE OF
14 ANOTHER CHEMICAL SUBSTANCE Y. FURTHERMORE, IT IS NOT
15 ISOLATED FROM SUBSTANCE Y. THAT'S WHAT WE HAVE THE PFAS
16 NOT -- WHICH IS NOT SEPARATED OR REMAINS WITH THE
17 FLUORINATED POLYETHYLENE.

18 WOULD IT BE ACCURATE TO DESCRIBE
19 SUBSTANCE X AS AN IMPURITY WITH NO REPORTING OBLIGATION?
20 YES, CHEMICAL SUBSTANCE X IS BOTH A BYPRODUCT AND AN
21 IMPURITY, AND THIS JUST PROVES OUR POINT.

22 THE COURT: AND THEREFORE NOT EXEMPT.

23 MR. SELIGMAN: AND THEREFORE NOT EXEMPT.

24 THE COURT: OKAY. ANYTHING ELSE ON THAT
25 ISSUE?

1 MR. SELIGMAN: THAT'S ALL, YOUR HONOR,
2 THANK YOU.

3 THE COURT: LET ME HEAR FROM MR. SUSSMAN.

4 MS. STETSON: YOUR HONOR, IF I CAN BE
5 HEARD JUST ON THAT LAST POINT FOR JUST TEN SECONDS?

6 THE COURT: SURE. OKAY.

7 MS. STETSON: WHAT MR. SELIGMAN LEFT OUT
8 WAS THE NEXT PHRASE, THE UNINTENTIONAL BYPRODUCT THAT
9 REMAINS WITH THE INTENDED PRODUCT, I.E., IS NOT ISOLATED
10 FROM THAT INTENDED PRODUCED IS AN IMPURITY.

11 THANK YOU.

12 MR. SUSSMAN: THANK YOU, YOUR HONOR.

13 THE COURT: GOOD MORNING.

14 MR. SUSSMAN: WE HAVE COVERED A LOT OF
15 GROUND THIS MORNING, AND I'M GOING TO TRY TO BE FAIRLY
16 TARGETED IN MY COMMENTS, ALTHOUGH THERE REALLY IS A LOT
17 ON THE TABLE HERE.

18 THE COURT: PLEASE START WITH STANDING.

19 MR. SUSSMAN: SO I DO WANT TO START WITH
20 THE IMPURITY AND BYPRODUCT --

21 THE COURT: SIR, PLEASE START WITH
22 STANDING?

23 MR. SUSSMAN: EXCUSE ME?

24 THE COURT: STANDING, COULD YOU PLEASE
25 START WITH THE STANDING ISSUE?

1 MR. SUSSMAN: YOU WANT ME TO DISCUSS
2 STANDING?

3 THE COURT: YES.

4 MR. SUSSMAN: OKAY. WE CAN CERTAINLY
5 START WITH THAT.

6 THE COURT: IT'S A THRESHOLD
7 JURISDICTIONAL ISSUE UNDER THE CONSTITUTION, I HAVE TO
8 ADDRESS IT.

9 MR. SUSSMAN: WE UNDERSTAND THAT. AND I
10 THINK THAT ISSUE IS EASILY RESOLVABLE, BECAUSE --

11 THE COURT: GIVE ME YOUR BEST FOR -- PICK
12 AN INDIVIDUAL OR PICK AN ORGANIZATION, BUT GIVE ME YOUR
13 BEST SINGLE EXAMPLE, YOUR BEST.

14 MR. SUSSMAN: OF WHAT?

15 THE COURT: STANDING.

16 MR. SUSSMAN: WELL, I DON'T THINK THERE
17 IS A STANDING ISSUE IN THIS CASE, YOUR HONOR, BECAUSE
18 THE SUPREME COURT HAS SAID THAT IF ONE OF THE PLAINTIFFS
19 HAS STANDING, THEN THERE IS NO NEED FOR A STANDING
20 DEMONSTRATION.

21 THE COURT: SKIP THAT ONE. SKIP THAT
22 ARGUMENT.

23 MR. SUSSMAN: OKAY, BUT IT'S A GOOD
24 ARGUMENT. IT'S PRETTY CLEAR.

25 THE COURT: MOVE ON.

1 MR. SUSSMAN: I WILL ACCEPT THAT.

2 SO LET'S TAKE ONE OF OUR INTERVENOR
3 PLAINTIFFS HERE, JAY DE LA ROSA. AND MR. DE LA ROSA HAS
4 A PART-TIME FURNITURE BUSINESS, AND HE ALSO SPENDS A LOT
5 OF TIME WORKING ON CARS AS A PART-TIME MECHANIC. AND
6 ACCORDING TO HIS DECLARATION, HE USES A LOT OF
7 AUTOMOBILE AND FURNITURE TYPE LIQUIDS AND PRODUCTS,
8 PAPER MOVERS WOULD BE AN EXAMPLE, AND THEY COME IN
9 PLASTIC CONTAINERS. IN HIS WORK ON A DAY-TO-DAY BASIS,
10 HE IS PROBABLY IN CONTACT WITH MULTIPLE PLASTIC
11 CONTAINERS. AND HE NOT ONLY TOUCHES THOSE CONTAINERS,
12 BUT HE IS IN SOME CASES LIKELY TO SPILL THEM ON HIS
13 HANDS OR HE MAY INHALE THE VAPORS THAT ARE EMANATING
14 FROM THE CONTAINERS.

15 HE DOES NOT KNOW WHETHER THEY ARE
16 FLUORINATED FOR A VERY SIMPLE REASON, WHICH IS THERE IS
17 NO LABELING ON THE CONTAINER WHICH INDICATES WHETHER IT
18 HAS BEEN FLUORINATED OR NOT. HOWEVER, WHAT WE KNOW IS
19 THAT POST-MOLD FLUORINATION IN THE UNITED STATES IS ONLY
20 PERFORMED BY INHANCE. AND WE ALSO KNOW THAT ACCORDING
21 TO INHANCE ITSELF, THE TYPES OF PRODUCTS THAT
22 MR. DE LA ROSA USES ARE PRODUCTS WHICH ARE TYPICALLY
23 FLUORINATED. INHANCE HAS PROVIDED MANY EXAMPLES OF
24 PRODUCTS THAT ARE SOLD IN FLUORINATED CONTAINERS, AND
25 CERTAINLY THE TYPE OF PAINT REMOVAL PRODUCTS, AUTOMOTIVE

1 PRODUCTS. THOSE ARE TYPICALLY SOLD IN FLUORINATED
2 CONTAINERS.

3 AND SO MR. DE LA ROSA IS --

4 THE COURT: FLUORINATED CONTAINERS THAT
5 ARE FLUORINATED BY INHANCE?

6 MR. SUSSMAN: I THINK THERE IS A HIGH
7 PROBABILITY OF THAT, BECAUSE I THINK THERE IS LITTLE, IF
8 ANY, NON-INHANCE FLUORINATION OCCURRING IN THE UNITED
9 STATES.

10 THE COURT: HOW DO YOU KNOW THAT?

11 MR. SUSSMAN: I THINK WE --

12 THE COURT: AND HOW DO YOU KNOW WE ARE
13 NOT DEALING WITH IMPORTS?

14 MR. SUSSMAN: EXCUSE ME?

15 THE COURT: HOW DO YOU KNOW WE ARE NOT
16 DEALING WITH IMPORTS?

17 MR. SUSSMAN: WELL, I MEAN, IMPORTS ARE
18 CERTAINLY POSSIBLE, BUT, YOU KNOW, I HAVE NEVER SEEN ANY
19 EVIDENCE, AND I DON'T KNOW THAT INHANCE HAS PROVIDED --

20 THE COURT: IT'S YOUR BURDEN, RIGHT?

21 MR. SUSSMAN: EXCUSE ME?

22 THE COURT: IT'S YOUR BURDEN?

23 MR. SUSSMAN: I'M SORRY, I DIDN'T HEAR
24 YOU.

25 THE COURT: IT'S YOUR BURDEN.

1 MR. SUSSMAN: I'M SORRY, YOUR HONOR.

2 THE COURT: IT IS YOUR BURDEN, STANDING.

3 MR. SUSSMAN: WELL, I DON'T THINK IT'S
4 OUR BURDEN TO ESTABLISH TO A 100 PERCENT PROBABILITY
5 THAT THE CONTAINERS THAT MR. DE LA ROSA IS EXPOSED TO
6 COME FROM INHANCE. THERE IS NO REALISTIC WAY HE CAN
7 ESTABLISH THAT. IT'S NOT WITHIN HIS PURVIEW AND HIS
8 ABILITY TO ESTABLISH THAT.

9 I THINK WHAT WE CAN SAY IS THAT THERE IS
10 A HIGH PROBABILITY THAT THESE CONTAINERS ARE
11 FLUORINATED, AND GIVEN THE CENTRAL AND DOMINANT ROLE OF
12 INHANCE IN FLUORINATING CONTAINERS IN THE UNITED STATES,
13 THERE'S A HIGH PROBABILITY THAT THESE CONTAINERS COME
14 FROM INHANCE. BUT MR. DE LA ROSA CAN'T GO BEYOND THAT.
15 IT'S PRACTICALLY IMPOSSIBLE FOR HIM TO BE ABLE TO SAY
16 CATEGORICALLY THAT THE CONTAINERS THAT HE USES ARE
17 FLUORINATED BY INHANCE. AND I DON'T THINK THE STANDING
18 LAW REQUIRES HIM TO SHOW THAT. IF HE WERE MERELY
19 SPECULATING THAT THESE CONTAINERS WERE COMING FROM
20 INHANCE, PERHAPS HE MIGHT NOT BE MEETING HIS BURDEN, BUT
21 I THINK --

22 THE COURT: SO IS THE ONLY
23 NON-SPECULATIVE FACT THAT INHANCE IS THE ONLY -- MAY BE
24 THE ONLY COMPANY IN THE U.S. DOING SURFACE FLUORINATION,
25 IS THAT THE ONLY NON-SPECULATIVE FACT?

1 MR. SUSSMAN: WELL, I DON'T KNOW WHAT YOU
2 MEAN BY THAT. I THINK THE OTHER NON-SPECULATIVE FACT IS
3 THAT MR. DE LA ROSA IN HIS DAILY WORK USES QUITE A
4 NUMBER OF PLASTIC CONTAINERS, AND --

5 THE COURT: WHICH MAY -- AND SOME OF
6 THOSE MIGHT BE FLUORINATED?

7 MR. SUSSMAN: WELL, I THINK WE KNOW THAT
8 THOSE TYPES OF PRODUCTS ARE FLUORINATED. WE KNOW THAT
9 FROM INHANCE ITSELF.

10 THE COURT: IT'S POSSIBLE?

11 MR. SUSSMAN: I THINK IT'S LIKELY.

12 THE COURT: WHY DO YOU THINK THAT?

13 MR. SUSSMAN: WHY DO I THINK IT'S LIKELY?
14 BECAUSE THE BARRIER PROPERTIES THAT FLUORINATION IMPARTS
15 ARE IMPORTANT FOR CERTAIN TYPES OF PRODUCTS, AND THAT'S
16 WHY A MARKET EXISTS FOR FLUORINATION IN THOSE SECTORS.
17 AND AGAIN, TAKE A CONTAINER OF PAINT REMOVAL AS AN
18 EXAMPLE. BARRIER PROPERTIES ARE VERY IMPORTANT TO THAT
19 CONTAINER. AND INHANCE SAYS, WE FLUORINATE CONTAINERS
20 WHICH ARE USED FOR THAT PURPOSE, SO I THINK THAT
21 THERE IS --

22 THE COURT: YOU ARE TELLING ME INHANCE
23 FLUORINATES CONTAINERS FOR PAINT REMOVER?

24 MR. SUSSMAN: YES.

25 THE COURT: FOR CONSUMER USE?

1 MR. SUSSMAN: YES.

2 THE COURT: WHERE IS THAT IN THE RECORD?

3 MR. SUSSMAN: IS IT RIPE?

4 THE COURT: IN THE RECORD?

5 MR. SUSSMAN: I THINK IT PROBABLY IS.

6 THE COURT: NO, WHERE IN THE RECORD?

7 MR. SUSSMAN: I THINK INHANCE IN THEIR

8 SNUNS, WHICH ARE IN THE RECORD, GIVES EXAMPLES OF

9 SEVERAL TYPES OF PRODUCTS THAT COME IN FLUORINATED

10 CONTAINERS. THAT IS CERTAINLY ONE SOURCE FOR THAT

11 INFORMATION. I BELIEVE, AND I WOULD NEED TO CHECK, YOUR

12 HONOR, THAT THERE IS EVIDENCE IN THE RECORD OF VARIOUS

13 USES AND APPLICATIONS WHICH INHANCE HAS PROMOTED AND

14 ADVERTISED AS REQUIRING BARRIER PROTECTION IN

15 FLUORINATION. I BELIEVE THE CITES ARE THERE, YOUR

16 HONOR, BUT I CAN'T GIVE THEM TO YOU AT THIS POINT.

17 THE COURT: SO MR. DE LA ROSA IS YOUR

18 BEST ARGUMENT?

19 MR. SUSSMAN: I WOULD NOT SAY HE IS OUR

20 BEST CASE. I THINK THAT HE ILLUSTRATES --

21 THE COURT: YOU WILL OR WILL NOT SAY HE

22 IS THE BEST CASE?

23 MR. SUSSMAN: HUM?

24 THE COURT: YOU WILL OR WILL NOT SAY HE

25 IS THE BEST CASE?

1 MR. SUSSMAN: I THINK HE IS A VERY GOOD
2 CASE.

3 THE COURT: IS HE THE BEST THAT YOU HAVE?

4 MR. SUSSMAN: I DON'T WANT TO ATTACH A
5 LOT OF MEANING TO THAT. I THINK HE IS A GOOD EXAMPLE OF
6 THE STANDING DEMONSTRATION THAT ALL OF OUR DECLARANTS
7 ARE MAKING. I WOULD SAY THAT.

8 THE COURT: IS IT FAIR TO SAY HE IS A
9 REPRESENTATIVE EXAMPLE OF YOUR STANDING FACTS?

10 MR. SUSSMAN: HE IS A GOOD EXAMPLE.

11 THE COURT: REPRESENTATIVE?

12 MR. SUSSMAN: REPRESENTATIVE OF ALL OF
13 THE OTHERS?

14 THE COURT: YES.

15 MR. SUSSMAN: I THINK, BASICALLY.

16 THE COURT: OKAY. LET ME ASK THE
17 GOVERNMENT A STANDING QUESTION NEXT, AND THEN I WILL
18 COME BACK TO YOU ON THE MERITS AFTER I AM DONE WITH
19 STANDING.

20 MR. SUSSMAN: OKAY. YOU WANT ME TO SIT
21 DOWN?

22 THE COURT: PLEASE.

23 MR. SUSSMAN: I WILL DO THAT.

24 THE COURT: THANK YOU.

25 WHAT IS THE GOVERNMENT'S POSITION ON THE

1 INTERVENING STANDING?

2 MR. GLADSTEIN: I DON'T KNOW THAT WE HAVE
3 A POSITION ON THAT, YOUR HONOR.

4 THE COURT: DOES THE UNITED STATES
5 GOVERNMENT ASCRIBE TO THIS ARGUMENT THAT INTERVENORS IN
6 CASES LIKE THIS HAVE STANDING AUTOMATICALLY?

7 MR. GLADSTEIN: NOT AUTOMATICALLY, NO. I
8 MEAN, THEY HAVE A STATUTORY RIGHT TO INTERVENE.

9 THE COURT: BUT DOES THAT CONVEY STANDING
10 WHEN THE UNITED STATES HAS STANDING, WHICH, OF COURSE,
11 IT DOES?

12 MR. GLADSTEIN: DOES NOT CONVEY IT
13 AUTOMATICALLY. IT HAS TO STAND ON ITS MERITS.

14 THE COURT: I AM REQUIRED TO DO AN
15 ARTICLE III STANDING EVALUATION UNDER SUPREME COURT CASE
16 LAW OF THE INTERVENORS, RIGHT?

17 MR. GLADSTEIN: CORRECT.

18 THE COURT: AS TO THOSE PARTICULAR
19 FACTUAL ALLEGATIONS THE INTERVENORS HAVE MADE, THE
20 GOVERNMENT DOES NOT HAVE A POSITION ON THE SIGNIFICANCE?

21 MR. GLADSTEIN: THAT IS CORRECT.

22 THE COURT: GOT IT. OKAY.

23 MS. STETSON. ALL RIGHT, STANDING?

24 MS. STETSON: NONE.

25 THE COURT: AND GIVE ME THE --

1 MS. STETSON: THE REASON IS -- AND TWO
2 POINTS. THE FIRST IS WITH RESPECT TO THE INTERVENOR
3 PLAINTIFFS CLAIMING STANDING BY VIRTUE OF THE
4 GOVERNMENT, TRANSUNION MAKES CLEAR THAT STANDING CANNOT
5 BE DISPENSED IN GROSS. I THINK THAT'S THE CITE.
6 PLAINTIFFS HAVE TO ESTABLISH THEIR STANDING FOR EACH
7 CLAIM THEY MAKE AND EACH FORM OF RELIEF THEY SEEK,
8 INCLUDING INJUNCTIVE RELIEF. THAT'S WHAT TRANSUNION
9 SAYS. THESE PLAINTIFFS ARE HERE SEEKING A FORM OF
10 RELIEF THAT THE GOVERNMENT IS NOT, SO THEY ABSOLUTELY
11 HAVE TO SHOW THEIR STANDING.

12 WITH RESPECT TO MR. DE LA ROSA, WHO MAY
13 OR MAY NOT BE THE BEST SINGLE EXAMPLE THAT THEY HAVE,
14 BUT HE IS THE ONE WE HEARD ABOUT. YOUR HONOR POINTED
15 OUT SOME OF THE FLAWS IN THE REASONING.

16 I WOULD MAKE A COUPLE OF POINTS. THE
17 FIRST IS THE CLAPPER CASE FROM THE SUPREME COURT
18 DISPENSES WITH THIS IDEA THAT YOU CAN SHOW SOME KIND OF
19 AN OBJECTIVE LIKELIHOOD IN THE AIR OF STANDING. WHAT
20 MR. DE LA ROSA WOULD NEED TO SHOW IS THAT HE FACES
21 IMMINENT INJURY FAIRLY TRACEABLE TO INHANCE.

22 AND IF YOU LOOK AT MR. DE LA ROSA'S
23 DECLARATION, WHICH IS IN THE APPENDIX THAT PEER AND CEH
24 ATTACHED, AND ONE OF THE THINGS HE SAYS IN PARAGRAPH 6
25 IS, I DO NOT KNOW WHETHER THE PLASTIC CONTAINERS THAT

1 ARE USED FOR MY FURNITURE BUSINESS AND WORK ON CARS HAVE
2 BEEN FLUORINATED. I UNDERSTAND THAT THE EPA HAS
3 CONCLUDED THAT PFAS HAS HEALTH EFFECTS. I WOULD LIKE TO
4 BE PROTECTED FROM THE RISKS OF PFAS. I JOINED THIS
5 LAWSUIT IN THE HOPE THAT IT WOULD RESULT IN A BAN ON
6 FLUORINATED CONTAINERS.

7 HE HAS A CONCERN THAT THE CONTAINERS THAT
8 HE WORKS WITH MAY OR MAY NOT BE FLUORINATED, MAY OR MAY
9 NOT BE FLUORINATED BY INHANCE, AND THEREFORE, MAY OR MAY
10 NOT CAUSE HIM IMMINENT HEALTH RISK. ALL OF THOSE MAY OR
11 MAY NOTS AMOUNT TO A LONG CHAIN OF SPECULATION.

12 YOU HEARD MR. SUSSMAN MENTION ONE THING
13 ABOUT INHANCE'S ROLE IN FLUORINATING IN THE U.S.
14 EMPHASIS ON, IN THE U.S. I THINK AS YOU POINTED OUT,
15 THERE ARE FLUORINATORS THAT COME FROM OVERSEAS, AND
16 THOSE PRODUCTS ARE IMPORTED IN THE U.S., AND THERE IS
17 SIMPLY NO TELLING. EVEN IF YOU SAY INHANCE FLUORINATES
18 X MILLION CONTAINERS A YEAR, THERE IS NO TELLING FOR
19 ARTICLE III CONSTITUTIONAL STANDING PURPOSES WHETHER
20 MR. DE LA ROSA ACTUALLY IMMINENTLY IS ABOUT TO SUFFER OR
21 IS SUFFERING AN INJURY OR A RECOGNIZABLE RISK OF INJURY
22 FROM THE CONTAINER THAT INHANCE FLUORINATED.

23 THE COURT: IT'S WORSE FOR THAT, RIGHT,
24 FOR THEM BECAUSE IT'S GOT TO BE -- WHAT IS AT ISSUE IN
25 THIS CASE IS AN INJUNCTION. THAT'S THE ONLY RELIEF,

1 ULTIMATELY. AND THAT INJUNCTION WOULD STOP INHANCE
2 FLUORINATING AT THE TIME THE INJUNCTION ISSUES, AND SO
3 THERE WOULD HAVE TO BE LIKE A CAN OF PAINT THINNER THAT
4 DOES NOT GET FLUORINATED LATER THAT DAY AFTER THE
5 INJUNCTION ISSUES, AND THEN -- IF THE INJUNCTION HAD NOT
6 ISSUED, THAT CAN OF PAINT THINNER WOULD HAVE WOUND ITS
7 WAY THROUGH THE CHANNELS OF COMMERCE AND INTO
8 MR. DE LA ROSA'S GARAGE, SO THERE'S A REDRESSABILITY
9 ISSUE --

10 MS. STETSON: THERE IS, YES.

11 THE COURT: -- IN THE FUTURE, RIGHT?

12 MS. STETSON: I WAS FOCUSING ON CAUSATION
13 AND TRACEABILITY, BUT THERE'S ABSOLUTELY A
14 REDRESSABILITY ISSUE AS WELL, YES.

15 THE COURT: OKAY. LET ME HAVE MR.
16 SUSSMAN BACK.

17 I HAVE SOME SERIOUS CONCERNS ABOUT
18 STANDING, WHICH IF YOU WOULD LIKE TO ADDRESS IT ANY
19 FURTHER, YOU MAY. BUT I ALSO WANT TO GIVE YOU THE
20 OPPORTUNITY TO BE HEARD ON THE MERITS, SO I WILL GIVE
21 YOU A LITTLE TIME TO ADDRESS THE MERITS, IF YOU WOULD
22 LIKE.

23 MR. SUSSMAN: I JUST WANT TO SAY ONE
24 THING ON THE STANDING ISSUE. I THINK THE ALIGNMENT
25 BETWEEN OUR CLAIMS AND REQUESTS FOR RELIEF AND THOSE OF

1 THE GOVERNMENT SHOULD BE DETERMINED BASED ON THE
2 COMPLAINTS THAT EACH OF US HAVE FILED. AND I THINK YOU
3 WILL FIND THAT THERE IS A HIGH DEGREE OF IDENTITY
4 BETWEEN OUR COMPLAINT AND THEIR COMPLAINT. AND THE
5 GOVERNMENT IN ITS COMPLAINT, IN FACT, REQUESTS
6 INJUNCTIVE RELIEF, AS WE DO.

7 SO I THINK WHAT INHANCE IS SAYING IS THAT
8 BECAUSE THE GOVERNMENT IS NOT NOW MAKING A MOTION FOR
9 INJUNCTIVE RELIEF AND SOMEHOW OUR CLAIMS AND PRAYER FOR
10 RELIEF ARE DIFFERENT FROM THEIRS, BUT I DON'T THINK
11 THAT'S THE RIGHT TEST. I THINK YOU NEED TO LINE UP THE
12 COMPLAINTS AGAINST EACH OTHER, AND I THINK IN THAT CASE
13 THERE IS A HIGH DEGREE OF INTERCHANGEABILITY.

14 THE COURT: OKAY. I WILL GIVE YOU A FEW
15 MINUTES TO DISCUSS THE MERITS, IF THERE IS PARTICULAR
16 MERITS ISSUES YOU WOULD LIKE TO HIGHLIGHT.

17 MR. SUSSMAN: YOU WILL --

18 THE COURT: IF YOU WOULD LIKE TO ADDRESS
19 THE MERITS OF YOUR SUMMARY JUDGEMENT MOTION, I WILL GIVE
20 YOU A FEW MINUTES TO ADDRESS THE MERITS.

21 MR. SUSSMAN: OKAY. I WOULD LIKE TO --
22 ARE YOU SAYING THIS ARGUMENT IS GOING TO END, YOUR
23 HONOR, AT -- ONCE WE CONCLUDE HERE BEFORE LUNCH?

24 THE COURT: YES.

25 MR. SUSSMAN: SO THIS IS OUR ONE

1 OPPORTUNITY TO ADDRESS THE MERITS OF OUR MOTION?

2 THE COURT: WELL, YOU HAD THE OPPORTUNITY
3 ON PAPER.

4 MR. SUSSMAN: RIGHT, RIGHT. NO, I JUST
5 WANT TO KNOW WHAT I SHOULD BE COVERING THAT WOULD BE
6 USEFUL TO YOU.

7 THE COURT: I WOULD SUGGEST COVERING --
8 IF THERE IS AN ARGUMENT THAT THE GOVERNMENT HAS NOT MADE
9 THAT YOU THINK IS VERY IMPORTANT AND YOU WANT TO TEE IT
10 UP FOR ME, YOU SHOULD ADDRESS THAT, OR IF THERE IS
11 SOMETHING UNIQUE TO THE INTERVENORS, THAT WAY WE DON'T
12 COVER THE SAME GROUND TWICE.

13 MR. SUSSMAN: LET ME TURN DIRECTLY TO THE
14 INJUNCTION ISSUE.

15 THE COURT: YOU KNOW WHAT, JUST FOR GOOD
16 USE OF OUR TIME, IF THERE IS GOING TO BE -- I WILL JUST
17 TELL YOU. IF THERE IS GOING TO BE AN INJUNCTION IN THIS
18 CASE AT SOME POINT, THERE'S GOING TO BE A MORE
19 SUBSTANTIAL EVIDENTIARY SHOWING LEADING UP TO AN
20 INJUNCTION, THERE'S GOING TO BE A HEARING, THE
21 GOVERNMENT IS GOING TO PARTICIPATE. SO THAT IS GOING TO
22 HAPPEN DOWN THE ROAD.

23 SO LET'S FOCUS ON LIABILITY.

24 MR. SUSSMAN: OKAY. WELL, I THINK ON THE
25 BYPRODUCT/IMPURITY ISSUE, WHAT WE REALLY HAVE TO DO IS

1 WE HAVE TO LINE UP THE FACTS OF THE FLUORINATION PROCESS
2 WITH THE DEFINITIONS OF IMPURITY AND BYPRODUCT. AND I
3 THINK THAT IF YOU LOOK AT INHANCE'S OWN DESCRIPTION OF
4 THE CHEMISTRY, IT FITS THE DEFINITION OF BYPRODUCT VERY
5 CLOSELY. INHANCE IS SAYING THAT THEY APPLY FLUORINE TO
6 MOLDED HDPE.

7 THE COURT: I GOT IT.

8 MR. SUSSMAN: AND FIRST THERE IS A
9 CHEMICAL REACTION BETWEEN --

10 THE COURT: THIS IS THE PART OF THE CASE
11 THAT I ACTUALLY UNDERSTAND, SO YOU CAN SURPASS IT.

12 MR. SUSSMAN: MY POINT ON THAT IS THAT IF
13 YOU LOOK AT THE DEFINITION OF IMPURITY -- OF BYPRODUCT,
14 THAT IS EXACTLY WHAT IS HAPPENING HERE, EXACTLY. AND SO
15 I DON'T THINK WE NEED TO GO ANY FURTHER THAN LOOKING AT
16 THE UNDISPUTED FACTS FOR THE FLUORINATION PROCESS AND
17 THE DEFINITION OF BYPRODUCT AND CONCLUDE THAT THIS IS A
18 BYPRODUCT.

19 THE OTHER THING THAT I WOULD SAY IS THAT
20 THERE IS SOME DIFFERENCES BETWEEN PART 720 AND PART 721,
21 AND WE DON'T REALLY HAVE TIME TO PARSE THEM. BUT ONE
22 THING WHICH IS VERY CLEAR ABOUT PART 721 IS THAT
23 BYPRODUCTS ARE NOT EXEMPT FROM SNUR REQUIREMENTS EXCEPT
24 UNDER CERTAIN LIMITED CIRCUMSTANCES WHICH DO NOT APPLY
25 HERE. SO I THINK ON THE FACE OF THE REGULATION, IF THIS

1 IS A BYPRODUCT, YOU ARE NOT EXEMPT. YOU NEED TO COMPLY
2 WITH THE REGULATION.

3 YOU CAN ALSO BE AN IMPURITY. YOU CAN BE
4 BOTH AN IMPURITY AND A BYPRODUCT, BUT I THINK IF YOU ARE
5 A BYPRODUCT, THEN YOU'RE COVERED.

6 THE COURT: OKAY.

7 MR. SUSSMAN: NOW, THE OTHER THING I
8 WANTED TO TALK ABOUT HERE IS WHERE WE STARTED THE
9 ARGUMENT THIS MORNING, AND THAT, I THINK, IS ON THE,
10 QUOTE, UNIQUENESS OF THE SITUATION AND THE RELATIONSHIP
11 BETWEEN THE ADMINISTRATIVE PROCESS AND THE ENFORCEMENT
12 ACTION. AND I DID WANT TO MENTION THAT THE PROCESS IN
13 THE STATUTE FOR SNURS, SIGNIFICANT NEW USE RULES, IS
14 IDENTICAL TO THE PROCESS FOR NEW CHEMICALS IN SECTION
15 5A. AND WITH NEW CHEMICALS, WE HAVE A TREMENDOUS AMOUNT
16 OF EXPERIENCE THAT WE DON'T HAVE WITH SNURS. BECAUSE,
17 YOU KNOW, FRANKLY, THERE ARE A NUMBER OF SNURS, BUT
18 THERE ARE MANY MORE NEW CHEMICALS THAT HAVE GONE THROUGH
19 THE EPA REVIEW PROCESS.

20 THE DEFINITION OF A NEW CHEMICAL IS A
21 CHEMICAL WHICH IS NOT LISTED ON THE TSCA INVENTORY. AND
22 THERE ARE MANY, MANY SITUATIONS WHERE COMPANIES COME TO
23 THE CONCLUSION THAT, YES, THEY WERE MANUFACTURING A
24 CHEMICAL THAT WOULD HAVE BEEN ELIGIBLE FOR INCLUSION
25 UNDER TSCA INVENTORY, BUT IT JUST WASN'T REPORTED TO

1 EPA.

2 SO HOW DOES EPA HANDLE THAT SITUATION?

3 IT'S A VERY COMMON SITUATION, ACTUALLY. AND IN THAT
4 SITUATION, TYPICALLY THE COMPANY COMES FORWARD, THEY
5 SAY, WELL, YOU KNOW, WE DIDN'T REPORT THIS FOR THE
6 ORIGINAL NATURAL, AND WE NOW FIND IT'S NOT ON THE
7 INVENTORY, WHAT DO WE DO? AND EPA TYPICALLY SAYS, IF
8 IT'S NOT ON THE INVENTORY, YOU HAVE TO SUBMIT A NOTICE,
9 AND YOU ALSO NEED TO STOP PRODUCTION WHILE THAT NOTICE
10 IS GOING THROUGH THE 90-DAY PROCESS AND WE DECIDE
11 WHETHER THERE IS A RISK OR NOT.

12 AND SO IN THAT SITUATION, MOST
13 COMPANIES -- AND I USED TO DO THIS WORK ALL THE TIME --
14 MOST COMPANIES, THEY SORT OF SAY, OKAY, THEY WANT US TO
15 STOP PRODUCTION. WE WILL STOP PRODUCTION. WE WILL
16 SUBMIT A PMM. WHAT IS UNIQUE ABOUT THIS CASE IS THAT
17 INHANCE HAS ELECTED TO COMPLY WITH ONLY ONE PART OF THE
18 STATUTORY REQUIREMENTS AND NOT THE OTHER PARTS OF THE
19 STATUTORY REQUIREMENTS.

20 IN OTHER WORDS, IT SAID, WE WILL SUBMIT
21 SIGNIFICANT NEW USE NOTICES, BUT WE ARE NOT GOING TO
22 STOP PRODUCTION, AND WE ARE NOT GOING TO WAIT FOR EPA TO
23 REVIEW THE NOTICE, WE ARE NOT GOING TO WAIT FOR EPA TO
24 DECIDE WHETHER THERE IS SOME REGULATORY ACTION THAT IS
25 NEEDED, WE ARE JUST GOING TO SUBMIT THE NOTICE.

1 AND THAT'S JUST NOT THE WAY THE STATUTE
2 WORKS, AND IT'S CERTAINLY NOT THE WAY THE STATUTE HAS
3 EVER WORKED FOR NEW CHEMICALS. I MEAN, THERE IS A
4 STRICT STATUTORY PROHIBITION ON MANUFACTURING EITHER A
5 NEW CHEMICAL OR A CHEMICAL FOR SIGNIFICANT NEW USE IF
6 EPA HAS NOT COMPLETED THE REVIEW PROCESS. AND IT IS
7 VERY CLEAR. IT'S A CLEAR PROHIBITION IN THE STATUTE.

8 SO INHANCE DID NOT HAVE TO SUBMIT
9 SIGNIFICANT NEW USE NOTICES. I THINK THAT IF THEY WERE
10 CONFIDENT THAT THEY WERE NOT A NEW USE OR IF THEY WERE
11 CONFIDENT THAT THEY WERE AN IMPURITY, THEY COULD HAVE
12 SAID, FINE, WE ARE JUST NOT COVERED, SO WE ARE NOT GOING
13 TO COMPLY WITH THE RULE.

14 INSTEAD THEY WANTED TO HAVE THEIR CAKE
15 AND EAT IT TOO. SO THEY SUBMITTED SIGNIFICANT NEW USE
16 NOTICES, BUT THEY CONTINUED TO MANUFACTURE. AND I THINK
17 THAT IS THE FUNDAMENTAL STATUTORY VIOLATION THAT IS AT
18 ISSUE IN THIS CASE.

19 I THINK IT'S ALSO VERY DIFFERENT FROM THE
20 PURPOSE OF THE ADMINISTRATIVE PROCEEDING. THE
21 ADMINISTRATIVE PROCEEDING IS BASED ON THE ASSUMPTION
22 THAT THIS IS A SIGNIFICANT NEW USE FOR WHICH A NOTICE IS
23 REQUIRED. AND THE QUESTION IS, WHAT IS THE RISK
24 ASSOCIATED WITH THESE CHEMICALS? IT IS NOT FOCUSED ON
25 WHETHER THERE WAS A VIOLATION OR NOT. THE SUBMISSION OF

1 THE NOTICE CERTAINLY TRIGGERS A REVIEW PROCESS, BUT IT'S
2 FOCUSED SOLELY ON THE RISK AND NOT ON WHETHER THE
3 COMPANY IS IN COMPLIANCE WITH TSCA REQUIREMENTS. AND
4 THAT'S THE ISSUE WHICH I THINK IS RIPE HERE. AND IT'S
5 NOT AN ISSUE THAT'S GOING TO BE RESOLVED IN AN
6 ADMINISTRATIVE PROCEEDING.

7 THE COURT: IT COULD BE.

8 MR. SUSSMAN: I DON'T THINK SO, BECAUSE
9 EPA HAS -- THEY HAVE TO PUT THEIR CARDS ON THE TABLE.

10 THE COURT: YOU ARE SPECULATING AS TO
11 WHAT EPA IS GOING TO DO?

12 MR. SUSSMAN: WELL, EPA HAS ISSUED, AS I
13 COUNT, THREE STATEMENTS OVER THE LAST YEAR-AND-A-HALF
14 WHICH SAY EXPLICITLY THAT FLUORINATION WHICH CREATES
15 LCPFACS IS SUBJECT TO DISCOVERY. AND THEY HAVE SAID
16 EXPLICITLY THAT THE FORMATION OF THESE LCPFACS IS THE
17 FORMATION OF BYPRODUCTS. I THINK EPA'S POSITION ON ALL
18 OF THIS IS CLEAR. I MEAN, YOU CAN ASK EPA TO GO BACK
19 AND REVISIT THE ISSUE, BUT I WOULD BE VERY SURPRISED IF
20 EPA HAS ANY INTEREST IN DOING THAT WHEN THEIR REVIEWING
21 IS DONE.

22 SO I THINK YOU HAVE ONE PROCEEDING WHICH
23 IS BASED ON ENFORCEMENT AND AN ONGOING VIOLATION OF THE
24 SNURS, AND THEN YOU HAVE ANOTHER PROCEEDING WHICH
25 ASSUMES THAT THE SNUR APPLIES AND IS LOOKING AT THE

1 RISKS ASSOCIATED WITH THE CHEMICALS. AND THERE'S REALLY
2 NO OVERLAP BETWEEN THOSE TWO PROCEEDINGS.

3 SO I THINK -- AND THIS MAY ANTICIPATE ONE
4 OF OUR INJUNCTIVE ARGUMENTS. IF THIS IS INDEED A
5 CLEAR-CUT VIOLATION OF THE SNUR AS WE SAY IT IS, THEN
6 WITH ALL DEFERENCE, YOUR HONOR, I DON'T KNOW THAT YOU
7 REALLY HAVE THE DISCRETION TO STAY THIS CASE. I THINK
8 THAT --

9 THE COURT: NOBODY IS STAYING ANYTHING.

10 MR. SUSSMAN: RIGHT, RIGHT. BUT I GUESS
11 WHAT I AM SAYING IS I THINK YOUR OBLIGATION IS TO MAKE A
12 DETERMINATION ON THE LIABILITY ISSUE. AND WE DON'T SEE
13 ANY DISCOVERY OR FURTHER FACT DEVELOPMENT WHICH IS
14 RELEVANT TO THAT ISSUE IN --

15 THE COURT: YOUR MOTION FOR SUMMARY
16 JUDGMENT WAS HEAVY.

17 MR. SUSSMAN: EXCUSE ME?

18 THE COURT: YOUR MOTION FOR SUMMARY
19 JUDGMENT WAS HEAVY. THERE WAS A LOT OF INFORMATION IN
20 THERE, THE VAST MAJORITY OF WHICH I DO NOT KNOW WHAT TO
21 DO WITH. I DO NOT KNOW WHETHER IT'S TRUE OR NOT.

22 MR. SUSSMAN: WE APOLOGIZE FOR THAT, BUT
23 I THINK THE MAJORITY OF THE INFORMATION THAT YOU ARE
24 TALKING ABOUT IS ONLY -- ONLY RELEVANT IF YOUR HONOR
25 CONCLUDES THAT IRREPARABLE INJURY AND A BALANCING OF THE

1 LAW THAT SAYS THAT --

2 THE COURT: NOT FOR THE TSCA, RIGHT?

3 MR. SUSSMAN: NO, NOT UNDER TSCA.

4 THE COURT: I JUST WANTED TO MAKE SURE I
5 WAS NOT MISSING THAT. GOT IT.

6 MR. SUSSMAN: CERTAINLY UNDER ANALOGOUS
7 STATUTES.

8 THE COURT: OKAY. I NEED TO MAKE SURE I
9 AM NOT MISSING A CASE.

10 MR. SUSSMAN: OKAY.

11 THE ONE OTHER THING THAT I WANTED TO SAY
12 HERE IS THIS SNUR IN COMMON WITH MANY AGENCY RULES IS A
13 RULE OF GENERAL APPLICABILITY. AND WHAT THAT MEANS IS
14 THAT THE RULE DESCRIBES IN GENERAL TERMS A COURSE OF
15 CONDUCT OR A SET OF ACTIVITIES WHICH ARE COVERED AND
16 IMPOSES A GENERAL PROHIBITION OR OTHER RESTRICTIVE --
17 RESTRICTION TARGETING AT THAT UNIVERSE OF ACTIVITIES.
18 IT IS NOT EPA'S JOB TO ANTICIPATE EVERY POSSIBLE FACT
19 SITUATION THAT MIGHT ARISE UNDER THE RULE AND DEAL WITH
20 THAT FACT SITUATION UPFRONT AT THE TIME THE RULE IS
21 PROMULGATED.

22 NOW, THIS RULE, IT'S VERY CLEAR ON ITS
23 FACE. IT ACTUALLY SAYS EXPLICITLY THAT THE RULE APPLIES
24 TO ANY MANUFACTURE OF THESE CHEMICALS FOR ANY USE OTHER
25 THAN THE SPECIFIC USES THAT HAVE BEEN EXEMPTED. AND SO

1 THIS IS NOT ONE OF THE USES THAT HAS BEEN EXEMPTED. WE
2 CAN TALK ABOUT WHY THAT'S THE CASE, BUT I THINK THE RULE
3 ON ITS FACE IS VERY CLEAR, THAT --

4 THE COURT: I THINK WE ALL AGREE ON THAT.

5 MR. SUSSMAN: OKAY. OKAY.

6 NOW, LET ME SPEAK TO A RELATED ISSUE,
7 WHICH IS WHETHER THERE SHOULD BE SOME INQUIRY BY THE
8 COURT INTO WHAT I WILL SAY, FOR A LACK OF A BETTER WORD,
9 INHANCE'S DILIGENCE, SOME EFFORT TO UNDERSTAND WHY
10 INHANCE MIGHT NOT HAVE UNDERSTOOD THAT THE RULE COULD
11 APPLY TO FLUORINATION. AND I WANT TO COMMENT ON TWO
12 ASPECTS OF THAT.

13 FIRST, I THINK THAT THIS IS A RULE THAT
14 IMPOSES STRICT LIABILITY. AND WHY SOMEBODY DOES OR DOES
15 NOT COMPLY MAY BE AN EXTENUATING FACTOR AT SOME POINT,
16 BUT IT IS NOT A BASIS TO EITHER APPLY OR WITHHOLD THE
17 APPLICATION OF THE RULE.

18 THE COURT: BUT THE PROMULGATION OF THE
19 RULE WAS PREMISED ON THE INFORMATION THAT WAS REASONABLY
20 AVAILABLE UNDER THE STATUTE, RIGHT?

21 MR. SUSSMAN: WELL, THAT'S A COMMON
22 SITUATION. AND EPA SAID, LOOK, YOU ARE OPEN FOR
23 BUSINESS HERE. IF YOU CAN DEMONSTRATE AN ONGOING USE,
24 WE WILL EXEMPT THAT. AND A LOT OF PEOPLE CAME IN AND
25 PROPOSED IT.

1 THE COURT: IF IT COULD BE SHOWN, AND I
2 DON'T KNOW, BUT IF IT COULD BE SHOWN THAT NO ONE COULD
3 POSSIBLY HAVE KNOWN THAT THE FLUORINATION PROCESS WAS
4 MAKING PFAS, THEN WHY SHOULD INHANCE BE FOREVER
5 FORECLOSED FROM HAVING ITS PROCESS CONSIDERED AN ONGOING
6 USE?

7 MR. SUSSMAN: LET ME TELL YOU WHAT IS IN
8 THE RECORD ON THIS ISSUE.

9 THE COURT: IT'S GOING TO BE A FACT
10 DISPUTE, SO I AM ASKING YOU TO ACCEPT MY HYPOTHETICAL.

11 MR. SUSSMAN: I THINK THAT -- FIRST OF
12 ALL, I WOULD SAY EVEN IF THEY COULD NOT HAVE DETERMINED
13 THAT THE RULE APPLIED, THE RULE ON ITS FACE IMPOSES
14 STRICT LIABILITY, SO I WOULD SAY IT'S JUST NOT RELEVANT.
15 AND I DON'T THINK THERE'S A BASIS TO INVESTIGATE THAT
16 ISSUE THROUGH DISCOVERY.

17 THE COURT: OKAY. THAT'S THE ANSWER THAT
18 I THINK --

19 MR. SUSSMAN: AND I DON'T THINK THAT
20 THERE IS A FAIR NOTICE ISSUE BECAUSE ALL EPA CAN DO IS
21 SET OUT THE METES AND BOUNDS OF THE RULE AND HOPE THAT
22 PEOPLE RULE IT, READ IT AND UNDERSTAND THAT THEY ARE
23 COVERED. I DON'T THINK THAT EPA HAS ANY OBLIGATION
24 ADMINISTRATIVELY OR CONSTITUTIONALLY TO AFFIRMATIVELY
25 INVESTIGATE EVERY POSSIBLE CIRCUMSTANCE.

1 THE COURT: SO WHEN THE STATUTE SAYS,
2 SIGNIFICANT NEW USE, I SHOULD READ THAT AS MEANING
3 SIGNIFICANT NEW TO THE EPA USE?

4 MR. SUSSMAN: YES.

5 THE COURT: OKAY.

6 MR. SUSSMAN: I THINK THAT'S RIGHT. AND,
7 YOU KNOW, THE STATUTE ACTUALLY SAYS THAT A USE IS
8 COVERED BY A SNUR IF EPA DETERMINES THAT SIGNIFICANT NEW
9 USE. AND IT THEN SAYS, EPA CAN CONSIDER A NUMBER OF
10 FACTORS IN MAKING THAT DETERMINATION. THERE IS SOME
11 THAT ARE LISTED IN THE STATUTE, THERE ARE OTHERS THAT
12 ARE NOT, BUT EPA HAS THE DISCRETION TO LOOK AT THOSE
13 FACTORS.

14 AND OBVIOUSLY, ONE OF THE FACTORS THAT IS
15 REASONABLE FOR EPA TO LOOK AT IS, WELL, YOU KNOW,
16 SITTING HERE TODAY WRITING THIS RULE, WHAT DO WE KNOW
17 AND WHAT CAN WE REASONABLY DISCOVER? AND I THINK EPA
18 MET THAT OBLIGATION. AND I WOULD SAY THAT THAT'S THE
19 END OF IT, AND WE CAN'T HAVE A VIOLATION OF THE RULE
20 NOTWITHSTANDING WHAT INHANCE KNEW OR DIDN'T KNOW.

21 BUT I DID WANT TO SAY THAT IT IS NOT
22 UNREASONABLE FOR A COMPANY WHOSE BUSINESS IS BASED ON
23 THE CHEMISTRY OF FLUORINE TO KNOW THAT THERE IS A HUGE
24 CONTROVERSY ABOUT THE PRODUCTION OF PFAS, WHICH IS
25 FLUORINE BASED -- EVERY PFAS IS FLUORINE BASED. AND SO

1 IF YOU UNDERSTAND FLUORINE CHEMISTRY, IT IS NOT A BIG
2 LEAP TO SAY, WELL, WHAT IF CARBOXYLIC ACID REACTS WITH
3 FLUORINE, WHAT WOULD THAT DO?

4 THAT'S YOUR BUSINESS. THAT'S THE SORT OF
5 THING YOU SHOULD KNOW. AND NOT ONLY THAT, I WILL ADD
6 ONE OTHER THING, WHICH IS A PAPER WAS PUBLISHED IN 2011,
7 2011, REPORTING A SET OF EXPERIMENTS AT THE UNIVERSITY
8 OF TORONTO SHOWING THAT ALL OF THE SAME LCPFACS THAT WE
9 ARE TALKING ABOUT TODAY WERE FORMED DURING FLUORINATION.
10 AND THE RESEARCHERS ACTUALLY CARRIED THAT TEST OUT ON
11 FLUORINATED CONTAINERS OBTAINED FROM INHANCE.

12 SO INHANCE IS BASICALLY SAYING, WE DIDN'T
13 KNOW ANYTHING ABOUT THAT. WELL, MAYBE THEY DIDN'T KNOW
14 ANYTHING ABOUT IT, BUT THEY SURE SHOULD. I MEAN, IT WAS
15 THEIR PRODUCTS THAT WERE TESTED.

16 THE COURT: MAYBE. MAYBE SO. EVERYTHING
17 YOU JUST SAID SEEMS REASONABLE ENOUGH. I DON'T KNOW HOW
18 TO DETERMINE THAT AT THIS STAGE.

19 MR. SUSSMAN: OKAY. OKAY. WELL, I THINK
20 I AM GOING TO STOP THERE, UNLESS THERE IS ANYTHING MORE?

21 THE COURT: THAT'S GREAT, VERY HELPFUL.

22 LET ME HEAR FROM THE GOVERNMENT ON JUST
23 FINAL -- ANYTHING MAYBE IN RESPONSE TO WHAT CAME FROM
24 THE INTERVENORS, AND THEN I WILL GIVE MS. STETSON ONE
25 MORE SHOT, AND THEN WE WILL WRAP IT UP.

1 MR. GLADSTEIN: YES, THANK YOU, YOUR
2 HONOR.

3 DID YOU HAVE ANY MORE QUESTIONS ON THE
4 RIPENESS QUESTION?

5 THE COURT: NO.

6 MR. GLADSTEIN: OKAY. THANK YOU.

7 AND I WILL SEE -- DID YOU HAVE ANYTHING
8 FOR MR. SELIGMAN ON HIS ISSUE?

9 THE COURT: NO, I JUST WANTED TO GIVE YOU
10 THE CHANCE TO RESPOND TO ANYTHING THAT WAS SAID.

11 MR. GLADSTEIN: NO.

12 MS. STETSON: THANK YOU, YOUR HONOR, JUST
13 A FEW QUICK POINTS IN RESPONSE TO MR. SUSSMAN.

14 THE FIRST IS WITH RESPECT TO IMPURITY AND
15 BYPRODUCT. WHAT YOU DIDN'T HEAR MR. SUSSMAN SAY WAS ANY
16 RESPONSE TO THE COMMENT IN THE FEDERAL REGISTER FINAL
17 RULE THAT I READ TO YOU TALKING ABOUT FLUORINATED
18 SUBSTANCES DEGRADING INTO LONG-CHAIN PFAS BEING TREATED
19 AS AN IMPURITY.

20 YOU ALSO DID NOT HEAR MR. SUSSMAN RESPOND
21 TO THE STATEMENT IN HIS EXHIBIT 23 OR HIS EXHIBIT 30
22 THAT PFAS IS AN IMPURITY.

23 MR. SUSSMAN TALKED FOR A WHILE ABOUT THE
24 NEW CHEMICAL TEST AND THE FACT THAT WHEN A NEW CHEMICAL
25 IS CREATED THAT IS NOT IN THE INVENTORY, THE MANUFACTURE

1 HAS TO GO TO EPA. OKAY. I AM NOT SURE THAT THAT IS
2 RELEVANT, BUT WE HAVE NO QUARREL WITH THAT.

3 THE COURT: I THINK HE IS DRAWING AN
4 ANALOGY THERE, HE IS SAYING IF A SIGNIFICANT NEW USE IS
5 REALLY SIGNIFICANT NEW TO THE EPA USE, WHICH HAS BEEN
6 SUGGESTED BY THE GOVERNMENT AND THE INTERVENORS, IN
7 ESSENCE. WELL, THAT KIND OF MAKES SENSE, BECAUSE THAT'S
8 BASICALLY THE RULE ON THE NEW CHEMICAL SIDE.

9 MS. STETSON: I THINK THE NEW CHEMICAL
10 SIDE INCLUDES AN INVENTORY OF CHEMICALS THAT ARE KNOWN
11 TO EXIST AND CHEMICALS THAT ARE NOT YET IN EXISTENCE,
12 NOT YET KNOWN TO EXIST. THIS PROCESS WAS IN EXISTENCE.
13 IT GETS YOU INTO THAT WHOLE QUESTION ABOUT KNOWLEDGE,
14 WHAT INHANCE KNEW, WHEN INHANCE KNEW IT. AND I CAN TELL
15 YOU THAT INHANCE, AS I THINK THE GOVERNMENT HAS
16 CONCEDED, DID NOT KNOW IN 2015 THAT THIS PARTICULAR
17 PROCESS WAS COVERED. SO I THINK THAT ANALOGY FALLS
18 DOWN.

19 THE COURT: EVEN IF FLUORINATION OF
20 SURFACES WAS KNOWN, ISN'T -- IF WE ARE GETTING TO THIS
21 QUESTION OF WHAT NEW IS, ISN'T THE NEWNESS, THE RELEVANT
22 NEWNESS IS THE EXIST- -- OR THE FIRST PART, OR THE
23 EXISTENCE OF A NEW CHEMICAL, NOT SOME PROCESS OR NOT
24 SOME WAY THE CHEMICAL MIGHT COME AROUND, BUT WITH THE
25 SIGNIFICANT NEW USE WHEN WE ARE TALKING ABOUT SOMETHING

1 THAT IS BEING PRODUCED INADVERTENTLY OR UNWITTINGLY, I
2 MEAN, IT'S NOT THE EXISTENCE OF THE PROCESS, IT'S THE
3 PRODUCTION OF THE CHEMICAL OF INTEREST.

4 MS. STETSON: IT IS THE PRODUCTION OF THE
5 CHEMICAL OF INTEREST AND EPA'S CONCLUSION THAT THAT
6 CONSTITUTES A USE THAT SUBJECTS THAT PARTICULAR
7 PRODUCTION OF THE CHEMICAL OF INTEREST TO THE
8 SIGNIFICANT NEW USE RULE. SO THERE ARE A NUMBER OF
9 FAULTY INTERPRETIVE STEPS HERE THAT I THINK EPA IS
10 NECESSARILY WEDDED TO TO PURSUE THIS ARGUMENT, AND YOU
11 JUST IDENTIFY ONE OF THEM.

12 TWO LAST POINTS. MR. SUSSMAN TALKED
13 ABOUT HOW -- I THOUGHT I HEARD HIM SAY THAT IF INHANCE
14 WAS SO CONFIDENT THAT WHAT IT WAS MANUFACTURING WAS AN
15 IMPURITY AND THAT ITS USE WAS ONGOING, THAT IT SHOULD
16 NOT HAVE SUBMITTED A SNUN, THAT SEEMS TO BE UNDULY
17 PUNITIVE FOR A COMPANY THAT WAS TRYING ITS BEST TO
18 COOPERATE WITH EPA AFTER IT GOT A NOTICE OF VIOLATION
19 FOR A USE THAT HAD BEEN GOING FOR DECADES.

20 THE LAST THING I WILL SAY IS MR. SUSSMAN
21 SAID ALSO THAT THE AGENCY PROCESS IS BASED ON THE
22 ASSUMPTION THAT THIS IS A SIGNIFICANT NEW USE. THAT'S
23 CORRECT. THAT'S ALSO WHY WE ARE HERE, BECAUSE THE
24 GOVERNMENT'S ENFORCEMENT ACTION IS BASED ON THAT SAME
25 ASSUMPTION. THIS MAPS EXACTLY ONTO THE ADMINISTRATIVE

1 PROCESS.

2 THERE WILL BE A POINT, AS MR. GLADSTEIN
3 SAID, WHERE THERE WILL BE A FINAL AGENCY ACTION, IS THE
4 PHRASE THAT HE USED, FROM THE AGENCY. AT THAT POINT,
5 INHANCE -- IF IT IS AN ADVERSE AGENCY ACTION, INHANCE
6 WILL GO TO A COURT OF APPEALS AND IT WILL POSE THE
7 QUESTIONS, DOES NEW MEAN OLD; DOES EPA'S INTERPRETATION
8 OF PFAS'S IMPURITIES ACTUALLY MEAN THEY ARE BYPRODUCTS;
9 AND DOES AN AGENCY HAVE THE ABILITY TO CLAIM FAIR NOTICE
10 WHEN THIS PARTICULAR REGULATED ENTITY HAD NO NOTICE AT
11 THE TIME?

12 IF THERE ARE ANY FURTHER QUESTIONS, I AM
13 HAPPY TO ANSWER THEM.

14 THE COURT: NO, THAT'S OKAY. THANK YOU.

15 MS. STETSON: THANK YOU.

16 MR. SUSSMAN: YOUR HONOR, CAN I ADD TWO
17 VERY --

18 THE COURT: SURE, YOU CAN DO IT FROM
19 THERE.

20 MR. SUSSMAN: I CAN SIT HERE?

21 THE COURT: YES, GO AHEAD.

22 MR. SUSSMAN: TO TIE UP SOME LOOSE ENDS.

23 ONE OF YOUR QUESTIONS WAS WHERE IN THE
24 RECORD CAN WE FIND A DESCRIPTION OF THE TYPICAL USES OF
25 FLUORINATED CONTAINERS. AND IN THE APPENDIX TO OUR

1 SUMMARY JUDGMENT BRIEF, YOU WILL FIND THAT INFORMATION
2 AT APPENDIX PAGE 243 AND 257.

3 THE COURT: THANK YOU.

4 MR. SUSSMAN: THE OTHER THING THAT I
5 WANTED TO MENTION IS I MISSPOKE WHEN I SUGGESTED THAT
6 THERE ARE NO CASES INVOLVING INJUNCTIONS TO RESTRAIN
7 TSCA VIOLATIONS. AND THERE ARE ACTUALLY ARE A NUMBER OF
8 THEM WHICH WE CITED IN OUR BRIEF, IN OUR SUMMARY
9 JUDGMENT BRIEF ON PAGE 28. SO I THINK THAT THERE IS
10 CERTAINLY A HISTORY OF COURTS ENTERING INJUNCTIONS TO
11 RESTRAIN TSCA VIOLATIONS.

12 THE COURT: DID ANY OF THOSE COURTS ENTER
13 THOSE INJUNCTIONS AUTOMATICALLY?

14 MR. SUSSMAN: WELL, NOT AUTOMATICALLY.
15 BUT I THINK BASED ON THE PREMISE THAT IT WAS THE ONLY
16 EFFECTIVE RESPONSE TO THE VIOLATION.

17 THE COURT: RIGHT. OKAY. ANYTHING ELSE?
18 ANYTHING FURTHER?

19 MR. SUSSMAN: NO, THAT'S IT.

20 THE COURT: ALL RIGHT. THANK YOU TO
21 EVERYONE FOR COMING TO THIS VERY PREPARED. IT WAS
22 EXTREMELY HELPFUL, AND FOR EVERYONE TO HAVE ALL OF THAT
23 INFORMATION AT THEIR FINGERTIPS ALLOWED ME TO GET
24 EVERYTHING OUT OF THIS THAT I NEEDED, SO THANK ALL OF
25 YOU VERY MUCH FOR DOING THAT. I KNOW IT'S A TON OF WORK

1 TO GET READY FOR SOMETHING LIKE THIS, BUT IT REALLY
2 HELPS.

3 IT'S GOING TO TAKE ME A WHILE TO SORT
4 THIS OUT AND GET SOMETHING IN WRITING. I'M NOT SITTING
5 HERE WITH A DRAFT OPINION LIKE I AM GOING TO GET IT OUT
6 TOMORROW OR SOMETHING. IT'S GOING TO TAKE SOME TIME.

7 IF THERE ARE ANY DEVELOPMENTS ON THE
8 REGULATORY FRONT, WHAT I WOULD ASK IS FOR THOSE TO BE --
9 YOU CAN WORK TOGETHER, HOWEVER YOU WANT TO DO IT. I
10 WOULD ASK FOR THOSE TO BE FILED. IF YOU FEEL THE NEED
11 TO SAY -- INCLUDE A LETTER WHERE YOU ARE EXPLAINING TO
12 ME THE SIGNIFICANCE OF WHATEVER THIS DEVELOPMENT IS,
13 THAT'S FINE, TOO. BUT I LIKE TO BE KEPT AWARE OF WHAT
14 IS GOING ON, IF ANYTHING, ON THE REGULATORY FRONT IN THE
15 MEANTIME, OKAY?

16 OKAY. ANY CLOSING BUSINESS?

17 MR. GLADSTEIN: NO.

18 THE COURT: ALL RIGHT. THANK YOU ALL
19 VERY MUCH AGAIN.

20 (COURT ADJOURNED.)

21 I CERTIFY THAT THE FOREGOING IS A CORRECT
22 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
23 ABOVE-ENTITLED MATTER.

24 DATE OFFICIAL COURT REPORTER

25 LYNN GLIGOR, RMR

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